TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 231.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, APPELLANT,

vs.

FREDERICK ZIMMERMAN, AS ADMINISTRATOR OF L. ZIMMERMAN, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED FEBRUARY 16, 1907.

(20,574.)

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1 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased: Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be holden in the City of Washington, District of Columbia, on the 16th day of February next, pursuant to an order allowing an appeal entered in the Clerk's office of the Circuit Court of the United States, for the District of Kansas, First Division, in that certain action numbered 7719, in which the Kansas City Northwestern Railroad Company is appellant and you are *appellee*, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witnesseth, the Honorable John C. Pollock, Judge of the Circuit Court of the United States, in and for the District of Kansas,
2 this 17th day of January, A. D. 1907.

JOHN C. POLLOCK,
Circuit Judge.

Service of the within citation, and the receipt of a copy thereof admitted, this 21 day of January, 1907.

ATWOOD & HOOPER,
Solicitors for Fredrick Zimmerman, Administrator.

3 & 4 [Endorsed:] No. 7719. Frederick Zimmerman, Adm'r, &c., *v.* The Kansas City North Western R. R. Co. Citation. Filed Jan'y 17, 1907. Geo. F. Sharitt, Clerk.

5 STATE OF KANSAS, *Leavenworth County, ss:*

In the District Court in and for said County.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Petition.

The above named plaintiff complains of the above named defendants and for cause of action against them and each of them alleges: that he is the duly appointed, acting and qualified Administrator of the estate of Leonard Zimmerman, deceased, and that the Kansas City, Northwestern Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and owns a railroad, engines, cars, etc., and is operating the same into and through the county and city of Leavenworth and through other counties and Cities in said state; that the said city of Leavenworth is a municipal corporation and City of the first class, under the laws of said State, and has been such during all the times herein mentioned.

Plaintiff further avers that on the 8th day of October, 1872, the Kansas City, Wyandotte & Northwestern Railway Company, a corporation, was duly organized and chartered for the purpose of constructing and maintaining a railroad and telegraph lines in connection therewith and the business of said railway company was to be transacted in the counties in the state of Kansas through which said railroad and telegraph lines passed; and that on the 27th day of September, 1886, the Leavenworth & Olathe Railroad Company, a

6 corporation, was duly organized and chartered for the purpose of constructing and maintaining and operating a standard and broad gauge railroad extending and intended to be run through and from the city of Leavenworth, in the county of Leavenworth, Kansas, then southwesterly through the counties of Leavenworth, Wyandotte and Johnson to the city of Olathe in the last named county.

Plaintiff further avers that after the organization and chartering of the aforesaid companies, they proceeded to condemn, lay out a right of way, and build a railroad through and into the city and County of Leavenworth; that before the completion thereof and to-wit, on the 29th day of March, 1887, the said Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company consolidated under the laws of the State of Kansas, as The Kansas City, Wyandotte & Northwestern Railroad Company, and in the articles of consolidation, the Kansas City, Wyandotte & Northwestern Railroad Company in writing accepted all the rights and privileges, and assumed all the obligations and liabilities of every nature and kind of the aforesaid companies, the Kansas

City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company; that thereafter said Kansas City, Wyandotte & Northwestern Railroad Company took charge of all the property of the aforesaid two companies, accepted all the rights, franchises and privileges and assumed all the obligations and liabilities of the aforesaid two companies, and proceeded to complete, construct and build said railroad.

Plaintiff further avers that said Leonard Zimmerman in his life time was the owner of fractional lot seven (7) in block seven (7) and lots six (6) and seven (7) in block eight (8) all in Fackler's Addition to the City of Leavenworth, Leavenworth county, Kansas; that Second street was a duly laid out and established graded street in the city of Leavenworth, running North and South, and running between blocks seven (7) and eight (8) block seven (7) lying on the East side of said Second street, and block eight (8) on the West side of said Second street, that said Zimmerman's property, to-wit, lot seven (7) faces Second street on the East and that said lot six (6) and fractional lot seven (7) face said Second street on the wast.

Plaintiff further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights as aforesaid, proceeded to finish, construct, and build its road in a north-easterly direction through the city of Leavenworth until it came to a
7 point on the south line of fractional lot seven (7) of said L. Zimmerman's property and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractonal lot seven (7) and constructed its railroad in the same direction across and over that part or portion of said Second street immediately in front of said L. Zimmerman's property mentioned aforesaid; graded, raised and made a high embankment of a permanent nature and placed rails thereon the whole width of said street and thereby changed and raised the established grade of said Second Street to a great height*h* immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money; as will more fully appear hereinafter.

Plaintiff further avers that on the 2nd day of February, 1889 said L. Zimmerman, deceased, began his action against said Kansas City, Wyandotte and Northwestern Railroad Company, in the district court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs and that on the 15th day of May, 1897, he duly recovered in the above entitled court and cause judgment against the defendant, said Kansas City Wyandotte & Northwestern Railroad Company for the sum of Three thousand dollars, ($3,000.00) which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

Plaintiff further avers that afterwards and on the 7th day of May, 1898, said judgment was duly revived in the name of Frederick

Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true copy of the judgment order of revivor hereto attached, made a part hereof and marked "Exhibit B."

Plaintiff further avers that during this time and about January 2, 1888, the said Kansas City, Wyandotte & Northwestern Railroad Company mortgaged its said road, franchise and equipments to the Farmers Loan and Trust Company of New York, and that on or about March 21, 1890 the said Trust Company began its action in the Circuit Court of the United States for the District of Kansas,

8 to foreclose its said mortgage, and that on or about the 18th day of June, 1891, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company foreclosing said mortgage and ordering said property to be sold unless within some short time thereafter, in said decree mentioned, said railroad company or some person or persons for them, should pay the amount of said mortgage indebtedness, with the expense and costs thereof, and that on or about the — day of —— 189– said railroad company and all its equipments, appurtenances, etc., were ordered to be sold and were on or about the — day of —— 189– duly sold to the defendant, the Kansas City, Northwestern Railroad Company, and that said defendant became the successor in interest to all the rights, franchises and privileges of said Kansas City, Wyandotte & Northwestern Railroad Company, and as part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company and the Kansas City, Wyandotte & Northwestern Railway Company *and the Kansas City, Wyandotte & Northwestern Railroad Company,* under and by virtue of said decree and purchase.

Plaintiff further avers that on the 17th day of November, 1886 the aforesaid Leavenworth & Olathe Railroad Company procured the Mayor and Counsel of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the city of Leavenworth, and that in said ordinance said Leavenworth & Olathe Railroad Company was granted the right to cross Second street at some point south of the north line of Maple street; also over the South levee Front street, and the South Esplanade from the South line of Fackler's Addition to the North line of Spruce, etc. and that as a condition for the grant and privilege mentioned in said ordinance, it was provided that in all such cases "where the grade of any street or public ground is changed by said company or its successors it shall protect the City from cost and damage at the suits of the property owners;" all of which will more fully appear by a true copy of said ordinance, hereto attached and made part hereof and marked "Exhibit C."

Plaintiff further avers that on or about the 19th day of

9 January, 1887 said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance; and that in and by the articles of consolidation mentioned aforesaid, the Kansas City, Wyandotte & North-

western Railroad Company, assumed, accepted and agreed to all the terms, obligations and conditions of said ordinance and that under and by virtue of the decree of foreclosure and the purchase aforesaid and of accepting and operating said railroad under and by virtue of the ordinances of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, the Kansas City, Northwestern Railroad Company has become liable to said plaintiff for the amount of said judgment with interest and costs.

Plaintiff further avers that long before the above judgment was obtained all the property of the Kansas City, Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, the Kansas City, Northwestern Railroad Company, and that under and by virtue of said decree and the ordinances of said city, said defendant Kansas City, Northwestern Railroad Company assumed and agreed to pay off any and all obligations of the Kansas City, Wyandotte & Northwestern Railroad Company and that under and by virtue thereof the Kansas City, Wyandotte & Northwestern Railroad Company has turned over to said defendant railroad company all of its property rights and franchises and has no property of any kind or description subject to execution and has refused to pay any part or portion of said judgment and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company and that said Kansas City, Wyandotte & Northwestern Railroad Company and defendant Kansas City, Northwestern Railroad Company neglect and refuse to pay the aforesaid judgment or any part thereof although often thereunto requested.

Plaintiff further avers that said defendant, the City of Leavenworth is permitting, aiding and assisting the Kansas City Northwestern Railroad Company, its co-defendant herein, in the operation and maintainance of said railroad within said city in violation of the plaintiff's rights and in violation of said ordinance and of the ordinances of said city and that it is permitting and aiding and assisting its co-defendant herein to run across said Second street and to maintain its embankments and tracks above the established grade of said Second street to the heighth of two or three feet or more; all in violation of the aforesaid ordinance and the ordinances of said city, well knowing that the said defendant company or any person or persons for them neglect and refuse to pay the aforesaid mentioned judgment or any part thereof or to duly compensate the property owners for damages they may have sustained by reason of the construction of said railroad and which said railroad companies its successors and assigns have agreed to pay when they accepted the privileges and benefits of said ordinance.

Wherefore plaintiff prays and demands judgment against the defendants the Kansas City, Northwestern Railroad Company and the City of Leavenworth for the sum of $3,000.00 with interest at the rate of six per cent. per annum from the 15th day of May, 1897 until paid and for costs of suit.

Plaintiff further prays that said defendant the Kansas City, Northwestern Railroad Company be permanently enjoined and restrained from operating its said railroad over that part or portion of defendant's land appropriated as aforesaid and from operating and maintaining said embankment across said Second street in front of plaintiff's property until it pays or some person or persons for them the aforesaid mentioned judgment and compensate said plaintiff for the damages and property taken by the aforesaid mentioned railroads and for all such other and further relief in the premises as plaintiff may be entitled to.

JNO. H. ATWOOD &
W. W. HOOPER,
Attorneys for Plaintiff.

11 "EXHIBIT A."

Ordinance No. 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth and Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:—

SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company for a period of 20 years from and after the passage of this ordinance; over and upon the following streets and public grounds of the city of Leavenworth, to-wit: Across Limit street on the Southern bound-ry of the city; also across Second street at some point south of the north line of Maple street; also over the south levee, front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth and Olathe Railroad Company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said right of way, such company or companies to pay the Leavenworth & Olathe Railroad Company a proportionate amount of the costs of the construction and maintainance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use to be determined by representatives one to be selected by each company and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad company neglects to name its representative, then the mayor and

council of this city shall designate another arbitrator who shall act with the others in determining the points of difference. Said
12 Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same and when practicable, shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same shall be determined by the engineer of said company and the city engineer and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance all rights under this ordinance shall be forfeited without further action on the part of the city.

Provided that if said company shall be delayed in the construction of its said road in the city of Leavenworth by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have within which to construct its said track, one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall by writing accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th, A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD, *City Clerk.*

Passed November 17th, A. D. 1886.
Published November 18th, A. D. 1886.

13 "EXHIBIT A."

UNITED STATES OF AMERICA:

Be it remembered, that at the April Term, A. D. 1897, of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the City of Leavenworth, commencing on Monday the 19th day of April, A. D. 1897, Present the honorable Louis A. Myers, Judge, J. H. Rothenberger Sheriff, of Leavenworth county, Kansas and James Gray, Clerk: the following proceedings were had to-wit:—

SATURDAY, *May 15th, A. D.* 1897.

Court met pursuant to adjournment.
Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

Now on this 15th day of May, A. D. 1897, and during the regular April Term of the District Court of Leavenworth County, Kansas, came on for hearing the defendant's motion for a new trial in the above entitled action; the plaintiff being present by his attorneys Baker Hook & Atwood and the defendant by its attorneys W. P. Waggener and C. F. W. Dassler and the matters and things having been submitted to the court and after arguments of counsel the said motion for a new trial is overruled, defendant excepting, and thereupon it is ordered adjudged and decreed that the said plaintiff do have and recover judgment of and from said defendant, for the sum of Three Thousand ($3000.00) dollars and for $—— costs of suit and that execution issue therefor.

On application of the defendant the time within which to make and serve a case-made for the Supreme court is hereby extended ninety (90) days from this date and the plaintiff is allowed 20 days thereafter in which to suggest amendments and the same to be settled on five days notice by either party.

14 "EXHIBIT B."

UNITED STATES OF AMERICA:

Be it remembered, that at the April Term, A. D. 1898, of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State begun and held in the City of Leavenworth, commencing on Monday the 18th day of April, A. D. 1898, Present the honorable Louis A. Myers, Judge, Peter Everhardy, Sheriff of Leavenworth county, Kansas and James Gray, Clerk; the following proceedings were had to-wit:—

SATURDAY, *May 7th, A. D.* 1898.

Court met pursuant to adjournment.
Present as before.

No. 10568.

L. ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

And now on this 7th day of May, A. D. 1898, comes Fred Zimmerman, Administrator of the estate of L. Zimmerman deceased, by Baker Hook & Atwood, his attorneys and thereupon came on for hearing the motion of the said administrator heretofore filed herein to revive in the name of Fred Zimmerman as administrator of the estate of L. Zimmerman, deceased, this action and the judgment heretofore rendered in this action, on May 15th, 1897, in favor of the plaintiff, L. Zimmerman and against the defendant The Kansas City Wyandotte and N. W. R. R. Co.; and it appearing to the court that the defendant herein has been duly and legally served with a notice of said motion and that they failed to appear either in person or by an attorney or to show any cause why said motion should not be sustained.

It is therefore now by the court considered ordered and adjudged that Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased be and he is hereby substituted as plaintiff herein with all the rights of the said plaintiff and that this action and the orders and judgment rendered herein stand revived and hereafter proceed in the name of the said Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased and that he as such administrator have and recover of and from said defendant herein the sum of $3000.00 with interest thereon at the rate of 6% per annum from the 15th day of May, 1897, until paid and also the costs in this suit and that execution issue therefor.

STATE OF KANSAS, *Leavenworth County, ss:*

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be —— true full and complete copy of the journal entry of the order of court reviving this action and judgment in name of Fred Zimmerman as administrator of the estate of L. Zimmerman, in the therein entitled cause, as the same remains of record in my office.

Witness my hand and the seal of said court affixed at my office in the City of Leavenworth, this the 24th day of May, A. D. 1899.

JAMES GRAY, *Clerk*,
By J. H. KIRMEYER,
Deputy Clerk.

16 *Præcipe for Summons.*

THE STATE OF KANSAS, *Leavenworth County, ss:*

In the District Court of the First Judicial District of the State of Kansas, Sitting in the County of Leavenworth, in Said State.

No. —.

FREDERICK ZIMMERMAN, as Administrator, &c., Plaintiff,
versus
KANSAS CITY NORTHWESTERN RAILROAD CO. ET AL., Defendants.

The Clerk of the above named court will please issue a summons to the defendant Kansas City Northwestern R. R. Co. and the City of Leavenworth in the above entitled cause, directed to the Sheriff of Leavenworth county, Kansas, to serve, returnable within 10 days from this date. Suit brought for recovery of money. Amount claimed $3000.00 with interest at 6% from May 15th, 1897 until paid and costs of suit.

Dated the 31st day of May A. D. 189–.

JOHN H. ATWOOD AND
W. W. HOOPER,
Attorneys for Plaintiff.

Endorsed: No. — Præcipe for Summons. District Court, Leavenworth County, Kansas. Frederick Zimmerman as administrator &c. *vs.* Kansas City Northwestern R. R. Co. *et al.* Filed May 21, 1899 James Gray, Clerk John H. Atwood and W. W. Hooper, Plaintiff's Attorney-.

17 UNITED STATES OF AMERICA.

STATE OF KANSAS,
First Judicial District, Leavenworth County, ss:

The State of Kansas to the Sheriff of Leavenworth County in said State, Greeting:

You are hereby commanded to notify Kansas City Northwestern Railroad Company and the City of Leavenworth that they have been sued by Frederick Zimmerman administrator of the estate of L. Zimmerman deceased, in the District court sitting in and for said county of Leavenworth, and that unless they answer by the 30th day of June A. D. 1899 the petition of the said Frederick Zimmerman administrator of the estate of L. Zimmerman, deceased against them, filed in the Clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this Summons, on the 10th day of June 1899.

Witness my hand and the seal of said court, affixed at my office, in the City of Leavenworth, this the 31st day of May, 1899.

[SEAL.] JAMES GRAY, *Clerk.*

Suit brought for the recovery of money. Amount claimed $3,000.00 with interest thereon from May 15th, 1897 at the rate of 6 per cent. per annum until paid and for costs of suit &c. "See Petition" Jno. H. Atwood & W. W. Hooper, attorneys for plaintiff.

Endorsed: Received May 31st A. D. 1899 at 4:15 o'clock P. M. Summons. Page 64 No. 13947 Docket 23 District Court, Leavenworth county, Kansas. Frederick Zimmerman administrator &c. *vs.* Kansas City Northwestern Railroad Company *et al.* Issued May 31st, 1899 Returnable June 10th, 1899 Answer due June 30th, 1899 Jno. H. Atwood & W. W. Hooper, Plaintiff's attorneys.

I received this Summons on the 31st day of May A. D. 1899 at 4.15 o'clock P. M. of that day, and I served the same Summons in my county of Leavenworth, Kansas, on the within named defendant Kansas City Northwestern Railroad Company a corporation by delivering a true and certified copy thereof with all the endorsements thereon to E. W. Waynant personally on the 5th day of June A. D. 1899 he the said E. W. Waynant then and there being the general agent and freight agent of said defendant and there being no person residing in said county of Leavenworth, Kansas designated by said defendant Kansas City Northwestern Railroad Company a corporation on whom all process and notices issued by any court of record or Justice of the Peace of said county may be served and on the same day I serve- the other within named defendant The City of Leavenworth by delivering a true and certified copy thereof with all of the endorsements thereon to S. F. Neely personally he the said S. F. Neely then and there being Mayor and chief officer of the within named defendant The City of Leavenworth.

18

Dated this 7th day of June A. D. 1899.

PETER EVERHARDY,
Sheriff of Leavenworth County, Kas.,
By THOS. J. BROWN,
Deputy Sheriff.

Fees.

Service (2 persons)	$.75
Copy (2)	.50
Non est (—)	—
Mileage (— miles)	—
Total	$1.25

Filed this 7 day of June A. D. 1899.

JAMES GRAY, *Clerk.*

19 In the District Court of Leavenworth County, Kansas.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Demurrer.

Now comes said defendant, The Kansas City Northwestern Railroad Company, and demurs to the petition of the plaintiff filed herein for the reason;

1. Because the court has no jurisdiction of the subject matter of said action, and no authority of law to hear, try or determine the issues therein.

2. Because the petition of the plaintiff herein does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

WAGGENER, HORTON & ORR,
Attorneys for Defendant The Kansas City Northwestern Railroad Co.

Endorsed: 13947 Fred'k Zimmerman adm'r. Plaintiff *vs.* The Kansas City Northwestern Rld. Co. Defendant. Demurrer. Filed June 28, 1899 James Gray, Clerk J. H. Kirmeyer Deputy Waggener, Horton & Orr Atty's for K. C. N. W. Rld. Co.

20 In the District Court of Leavenworth County, Kansas.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Petition for Removal.

To the Honorable The District Court of Leavenworth County, Kansas:

Your petitioner, The Kansas City Northwestern Railroad Company, respectfully shows to this honorable court, that the matter and amount in dispute in the above entitled cause, exceeds exclusive of interest and costs, the sum of $2,000.

Your petitioner further shows, that it appears from the plaintiffs petition filed herein, that on January 2nd, 1888, The Kansas City, Wyandotte & Northwestern Railroad Company, mortgaged its road, franchises and equipment to The Farmer's Loan & Trust Company, of New York, and that on or about the 21st day of March, 1890, the said The Farmers Loan & Trust Company of New York,

began its action in the Circuit Court of the United States, for the District of Kansas, to foreclose said mortgage, and that on or about the 18th day of June 1891, a decree was duly entered against the said, The Kansas City, Wyandotte & Northwestern Railroad Company, foreclosing said mortgage, and ordering said property to be sold; and that thereafter the said property of said, The Kansas City, Wyandotte & Northwestern Railroad Company was duly sold, and the sale was thereafter duly confirmed; and that the said, The Kansas City Northwestern Railroad Company, the defendant herein, became the successor in interest to all the rights, franchises and privileges of said, The Kansas City, Wyandotte & Northwestern Railroad Company, and as a part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company, and The Kansas City, Wyandotte & Northwestern Railroad Company, and The Kansas City, Wyandotte and Northwestern Railroad Company, under and by virtue of said decree and purchase; and the said plaintiff bases his cause of action upon said decree of the Circuit Court of the United States, for the District of Kansas, and upon the constitution and laws of the United States, and that to determine said above cause involves the construction of said decree, and of the Constitution and of the laws of the United States; and that said above entitled cause is one growing out of said decree and of the sale of the property of the said, Kansas City, Wyandotte & Northwestern Railroad Company to this defendant, which said decree was entered in said cause pending between said, The Farmers Loan & Trust Company of New York, and The Kansas City, Wyandotte & Northwestern Railroad Company, in the Circuit Court of the United States for the District of Kansas, and involves the construction of said decree and the constitution and laws of the United States.

And your petitioner further shows, that the said above entitled suit can be fully and justly determined as between said plaintiff and this petitioning defendant if the same shall be removed to the Circuit Court of the United States for the District of Kansas; and that said controversy between the plaintiff herein and this defendant, is a separable controversy, with respect to which separable controversy, the City of Leavenworth being defendant, in the above entitled cause, has no concern; and your petitioner offers herewith a good and sufficient bond for its entering into the Circuit Court of the United States in and for the District of Kansas, First Division, on the first day of the next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety upon the bond and to cause the said record herein to be removed to the Circuit Court of the United States in and for the District of Kansas, First Division, and your petitioner will ever pray.

21 WAGGENER, HORTON & ORR,
Attorneys for Defendant The Kansas City Northwestern Railroad.

STATE OF KANSAS, *County of Atchison, ss:*

W. P. Waggener, being first duly sworn, deposes and says that he is one of the duly authorized attorneys for the defendant, The Kansas City Northwestern Railroad Company; that he has read the within and foregoing petition for removal, and that the matters and things therein stated are true.

W. P. WAGGENER.

Subscribed and sworn to before me this 20th day of June, A. D. 1899.

[SEAL.] S. E. HARBURGER,
Notary Public.

My Commission expires on the 26th day of March, A. D. 1901.

In the District Court of Leavenworth County, Kansas.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Bond for Removal.

Know All Men By These Presents: That the Kansas City Northwestern Railroad Company as principal, and C. S. Hetherington as surety, are holden and stand firmly bound unto Frederick Zimmerman, Administrator of the estate of L. Zimmerman, deceased, in the penal sum of $1,000, for the payment of which, well and truly to be made, unto the said Frederick Zimmerman, his heirs, assigns and successors in office, we bind ourselves, our heirs, successors representatives and assigns, jointly and severally, firmly by these presents, upon the condition nevertheless that;

Whereas the said The Kansas City Northwestern Railroad Company has petitioned the District Court of Leavenworth county, Kansas, for the removal of a certain cause therein pending, wherein said, Frederick Zimmerman administrator of the estate of L. Zimmerman, deceased, is plaintiff, and the said The Kansas City Northwestern Railroad Company, and the City of Leavenworth are defendants, to the Circuit Court of the United States, in and for the District of Kansas, First Division.

Now Therefore, if the said The Kansas City Northwestern Railroad Company shall enter in the Circuit Court of the United States for the District of Kansas, First Division, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States in and for the District of Kansas, First Division, if said court shall hold that said suit was wrongfully or [omproperly] removed thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

In Witness Whereof, The Kansas City Northwestern Railroad Company as principal, and C. S. Hetherington as surety, have executed these presents this 21st day of June, A. D. 1899.

THE KANSAS CITY NORTHWESTERN RLD. CO.,
By W. P. WAGGENER, *Its Attorney.*

C. S. HETHERINGTON, *Surety.*

22 STATE OF KANSAS, *County of Atchison, ss:*

C. S. Hetherington, being first duly sworn on oath deposes and says, that he is the surety on the above bond; that he is a citizen and resident of the City and County of Atchison, State of Kansas, and that he is worth the sum of $10,000 exclusive of all debts, liabilities and exemptions.

C. S. HETHERINGTON.

Subscribed and sworn to before me this 21st day of June, A. D. 1899.

[SEAL.] S. E. HARBURGER,
Notary Public.

My Commission expires on the 26th day of March, 1901.

Indorsed: 13947 E. Fred Zimmerman, adm. Plaintiff, *vs.* The Kansas City Northwestern Rld. Co., Defendants. Petition for Removal and Bond. Filed June 28, 1899. James Gray, Clerk. By J. H. Kirmeyer, Deputy. Waggener, Horton & Orr, Attys. for Defendant.

THE STATE OF KANSAS,
First Judicial District, Leavenworth County, ss:

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county aforesaid, do hereby certify *that* the above and foregoing to be a true full and correct transcript of the record in the therein entitled case as the same remains in my office.

Witness my hand and the seal of said court affixed at my office in the City of Leavenworth, this the 15th day of July, A. D. 1899.

[SEAL.] JAMES GRAY,
Clerk of the District Court.

Endorsed: No. 7719. No. 13947. District Court, Leavenworth county, Kansas. Frederick Zimmerman as administrator, &c. Plaintiff, *vs.* Kansas City Northwestern R. R. Co. *et al.*, Defendant. Transcript of Record. Petition, &c. Filed May 31st, 1899, James Gray, Clerk District Court. Filed Jul- 18, 1899. Geo. F. Sharitt, Clerk.

23 UNITED STATES OF AMERICA, *State of Kansas, ss:*

In the Circuit Court of the United States in and for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
KANSAS CITY & NORTH WESTERN RAILROAD COMPANY, Defendants.

Motion.

Now comes the above named plaintiff, and moves the court to grant leave to plaintiff to amend and recast the petition or bill filed herein, a transcript of which was filed by the defendants in their removal from the State Court and placed upon the equity side of this court (the same being an equity case) so that it may conform to the forms of equity pleadings and practice in this court.

JNO. H. ATWOOD AND
W. W. HOOPER,
Attorneys for Plaintiff.

Endorsed: No. 7719. Zimmerman, admr., etc., *vs.* K. C. N. W. R. R. Co. Motion for leave to amend & recast Bill to conform to equity. Filed Oct. 11, 1899. Geo. F. Sharitt, clerk.

24 UNITED STATES OF AMERICA, *State of Kansas, ss:*

In the Circuit Court of the United States in and for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
KANSAS CITY & NORTH WESTERN RAILROAD COMPANY ET AL., Defendants.

Journal Entry and Order.

Now on this 11th day of October, came the plaintiff herein by W. W. Hooper, his attorney and thereupon came on for hearing the plaintiff's motion heretofore filed herein on this day, for leave to amend and recast plaintiff's pleadings herein so as to conform to the forms and equity practice of this court; and the court after being fully advised in the premises now here sustains said motion.

It is therefore ordered that the plaintiff be and he is hereby granted leave to amend, recast and change his petition or bill, a transcript of which has been filed in this court by defendants, so that the same may conform to the forms and equity practice of this court, within thirty days from this date. And the defendants are

hereby given until the December Rules, 1899, to plead answer or demur thereto.

WILLIAM C. HOOK, *Judge.*

Endorsed: No. 7719. Zimmerman *vs.* K. C. N. W. R. R. Co. Order. Filed Oct. 11, 1899. Geo. F. Sharitt, clerk Jno. H. Atwood, and W. W. Hooper.

25 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
KANSAS CITY NORTHWESTERN RAILWAY COMPANY ET AL., Defendant.

Stipulation.

It is hereby stipulated by and between the parties hereto that the above named plaintiff may have thirty days from the 11th day of November, 1899, to amend and recast hi pleadings herein so as to conform to the equity practice of this court, and the defendant may have until the February rule day of this court to plead or answer in said cause.

JNO. H. ATWOOD AND
W. W. HOOPER,
Attorneys for Plaintiff,
WAGGENER, HORTON & ORR,
Attorneys for Defendant.

Endorsed: No. 7719. Stipulation. Filed Nov. 27, 1899. Geo. F. Sharitt, clerk.

26 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,
vs.
THE KANSAS CITY, NORTHWESTERN RAILWAY COMPANY, & THE CITY OF LEAVENWORTH, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division:

Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, and a resident and citizen of Kansas, brought his action in the District Court of Leavenworth County, Kansas, against the above named defendants, The Kansas City Northwestern Railroad Company and the City of Leavenworth, also residents and

citizens of the State of Kansas, and upon the petition of the defendants, The Kansas City Northwestern Railroad Company the same was ordered removed from the District Court of said county to the Circuit Court of the United States for the District of Kansas, and a transcript of the record of said court was filed in said Circuit Court on the 18th day of July, 1899, and assigned to equity division of this court and upon leave first had and obtained from said court and by and with the consent of the defendants, leave was given plaintiff to amend, recast and file this pleading so as to conform to the equity practice thereof.

Your complainant further alleges that he is the duly appointed, acting and qualified administrator of the estate of Leonard Zimmerman, deceased, and that the Kansas City Northwestern Railroad Company, is a railroad company duly organized and existing under and by virtue of the laws, of the State of Kansas, and owns a railroad, engines, cars, etc., and is operating the same into and through the county and city of Leavenworth and through
27 other counties and cities in said State. That the said City of Leavenworth is a municipal corporation and city of the first class under the laws of the state of Kansas, and has been such during all the time hereinafter mentioned.

Your complainant further avers that on the 8th day of October, 1872 The Kansas City, Wyandotte & Northwestern Railroad Company, a corporation was duly organized and chartered for the purpose of constructing and maintaining a railroad and telegraph lines in connection therewith and the business of said railway company was to be transacted in the counties in the State of Kansas, through which said railroad and telegraph lines passed; and that on the 27th day of September, 1886, the Leavenworth and Olathe Railroad Company, a corporation, was duly organized and chartered for the purpose of constructing and maintaining and operating a standard and broad *guage* railroad extended and intended to be run through and from the city of Leavenworth, in the county of Leavenworth, Kansas, then southwesterly, through the counties of Leavenworth, Wyandotte and Johnson to the City of Olathe, in the last named county.

28 Your complainant further avers that after the organizing and chartering of the aforesaid companies, they proceeded to condemn, out a right of way, and build a railroad through and into the City and County of Leavenworth; that before the completion thereof and to-wit, on the 29th day of March, 1887, the said Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company consolidated under the laws of the state of Kansas, as The Kansas City, Wyandotte & Northwestern Railroad Company, and in the articles of consolidation, the Kansas City, Wyandotte & Northwestern Railroad Company in writing accepted all the rights and privileges, and assumed all the obligations and liabilities of every nature and kind of the aforesaid companies, the Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company; that thereafter said Kansas City, Wyandotte & Northwestern Railroad Company took

charge of all the property of the aforesaid two companies, accepted all the rights, franchises and privileges and assumed all the obligations and liabilities of the aforesaid two companies, and proceeded to complete, construct and build said railroad.

Your complainant further avers that said Leonard Zimmerman in his life time was the owner of fractional lot seven (7) in block seven (7) and lots six (6) and seven (7) in block eight (8) all in Fackler's Addition to the City of Leavenworth, Leavenworth county, Kansas; that Second street was a duly laid out and established graded street in the city of Leavenworth, running North and South, and running between blocks seven (7) and eight (8) block seven (7) lying on the East side of said Second street, and block eight (8) on the West side of said Second street; that said Zimmerman's property, to-wit, lot seven (7) faces Second street on the East and that said lot six (6) and fractional lot seven (7) face said Second street on the west.

Your complainant further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights as aforesaid, proceeded to finish, construct, and build its road in a north-easterly direction through the city of Leavenworth until
29 it came to a point on the south line of fractional lot seven (7) of said L. Zimmerman's property and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractional lot seven (7) and constructed its railroad in the same direction across and over that part or portion of said Second street immediately in front of said L. Zimmerman's property mentioned aforesaid; graded, raised and made a high embankment of a permanent nature and placed rails thereon the whole width of said street and thereby changed and raised the established grade of said Second street to a great heighth immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money; as will more fully appear hereinafter.

Your complainant further avers that on the 2nd day of February, 1889 said L. Zimmerman, deceased, began his action against said Kansas City, Wyandotte and Northwestern Railroad Company, in the district court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs and that on the 15th day of May, 1897, he duly recovered in the above entitled court and cause judgment against the defendant, said Kansas City Wyandotte & Northwestern Railroad Company for the sum of Three thousand dollars, ($3,000.00) which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

Your complainant further avers that afterwards and on the 7th day of May, 1898, said judgment was duly revived in the name of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true

copy of the judgment order of revivor hereto attached, made a part hereof and marked "Exhibit B."

Your complainant further avers that during this time and about January 2, 1888, the said Kansas City, Wyandotte & Northwestern Railroad Company, mortgaged its said road, franchise and equipments to the Farmers Loan and Trust Company of New York, and that on or about March 21, 1890 the said Trust Company began its action in the Circuit Court of the United States for the Dis-
30 trict of Kansas, to foreclose its said mortgage, and that on or about the 18th day of June, 1891, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company foreclosing said mortgage and ordering said property to be sold unless within some short time thereafter, in said decree mentioned, said railroad company or some person or persons for them, should pay the amount of said mortgage indebtedness, with the expense and costs thereof, and that on or about the — day of —— 189– said railroad company and all its equipments, appurtenances, etc., were ordered to be sold and were on or about the — day of —— 189– duly sold to the defendant, the Kansas City, Northwestern Railroad Company, and that said defendant became the successor in interest to all the rights, franchises and privileges of said Kansas City, Wyandotte & Northwestern Railroad Company, and as part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company and the Kansas City, Wyandotte & Northwestern Railway Company *and the Kansas City, Wyandotte & Northwestern Railroad Company* under and by virtue of said decree and purchase.

And your complainant further avers that at said sale George C. Smith, and B. P. Waggener, became the purchasing trustee for said defendant company and that said Waggener was, at the time of the beginning of the foreclosure proceedings mentioned aforesaid, and at the time of the purchase at said sale, the attorney and counsellor for the Kansas City Wyandotte & Northwestern Railroad Company in the action in which said L. Zimmerman recovered judgment against the Kansas City Wyandotte and Northwestern Railroad Company and that at the execution and approval of the deed hereinafter mentioned he still was such attorney and had actual knowledge of the pendency of said action.

Your complainant further avers that thereafter the master making such sale made his report thereof and thereafter and on the 9th day of April, 1894, upon the consideration of such report and sale was confirmed by said court which order of confirmation, among other matters, contained the following provisions:

"And said master commissioner is ordered and directed to
31 make the purchasers at said sale, to-wit, George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed conveying the property mentioned and described in said report to such purchasers, said report being confirmed, however, subject to the provisions of said original decree and subject to the provisions to be contained in the deed executed by said Master Commissioner to said purchasers."

Your complainant further avers that afterwards and in consummation of said sale a deed was executed by the master to said George C. Smith and B. P. Waggener, the purchasers, at said sale, conveying the rights and franchises granted as aforesaid, to them which deed was on the 19th day of June, 1894, approved by the court subject to certain condition set forth in the order of approval which order was written upon the original deed and is in the following language:

"The foregoing deed examined and approved, subject to the condition that the purchaser take the property subject to all orders of the court relating to the payment of the debts of the company, and the receiver and said property shall remain liable for such debts, if any there are remaining unpaid."

HENRY C. CALDWELL,
U. S. Circuit Judge.

which deed was thereupon entered upon the records in the office of the Register of Deeds of Leavenworth county, Kansas, and thereafter said George C. Smith and B. P. Waggener conveyed said property including the rights of way and franchises mentioned aforesaid to the defendant, The Kansas City Northwestern Railway Company, for whom they were acting as trustees and your complainant further avers that said company has no right, title or interest, in or to such property save and except as it acquired by said conveyance.

Your complainant further avers that he is the representative of a judgment creditor of the Kansas City, Wyandotte & Northwestern Railroad Company and one of the persons in whose favor such reservation and proviso as embodied in the orders, decrees judgments, orders of confirmation, and deed mentioned aforesaid, and said orders decrees judgments order of confirmation and deed are records of this court and complainant refers to them and prays that he may use them as part hereof, or so much thereof, as is deemed
32 pertinent to the issues herein, as if they had been fully set out.

Your complainant further avers that the said Kansas City, Wyandotte & Northwestern Railroad Company has no property, either personal or real, or of any kind, or character upon which the aforesaid judgment can be made or execution levied thereon by your complainant, and the said Kansas City, Wyandotte & Northwestern Railroad Company is now and has been for years last past, execution proof.

Your complainant further avers that on the 17th day of November, 1886, the aforesaid Leavenworth & Olathe Railroad Company procured the Mayor and Council of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the City of Leavenworth, and that in said ordinance said Leavenworth and Olathe Railroad Company was granted the right to cross Second street at some point south of the North line of Maple street; also over the south levee, Front street, and the South Esplanade, from the south line of Fackler's addition to the north line of Spruce, etc., and that as a condition for the grant and privilege mentioned in said ordinance, it was provided

that in all such cases "where the grade of any street or public ground is changed by said company or its successors it shall protect the City from cost and damage at the suits of the property owners; "all of which will more fully appear by a true copy of said ordinance hereto attached, and made a part hereof and marked "Exhibit C."

Your complainant further avers that on or about the 19th day of January, 1887, said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance; and that in and by the article of consolidation mentioned aforesaid, The Kansas City, Wyandotte & Northwestern Railroad Company, assumed, accepted and agreed to all the terms, obligations and conditions of said ordinance and that under and by virtue of the decree of foreclosure and the purchase aforesaid and of accepting and operating said railroad under and by virtue of the ordinance of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, The Kansas City Northwestern Railroad Company has become liable to said plaintiff for the amount of said judgment with interests and costs.

33 Your complainant further avers that long before the above judgment was obtained all the property of the Kansas City Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, the Kansas City Northwestern Railroad Company, and that under and by virtue of said decree and the ordinances of said city, said defendant, Kansas City Northwestern Railroad Company assumed and agreed to pay off any and all obligations of the said Kansas City Wyandotte and Northwestern Railroad Company and that under and by virtue thereof the Kansas City Wyandotte and Northwestern Railroad Company has turned over to said defendant Railroad Company all of its property rights and franchises, and has no property of any kind or description subject to execution and has refused to pay any part or portion of said judgment and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company and that the said Kansas City, Wyandotte & Northwestern Railroad Company and defendant Kansas City Northwestern Railroad Company neglect and refuse to pay the aforesaid judgment or any part thereof although often thereunto requested.

Your complainant further avers that said defendant, The City of Leavenworth is permitting aiding, and assisting the Kansas City Northwestern Railroad Company, its co-defendant herein, in the operation and maintenance of said railroad within said city in violation of the plaintiff's rights and in violation of said ordinance and of the ordinances of said city and that it is permitting and aiding and assisting its co-defendant herein to run across said Second Street, and to maintain its embankments and tracks above the established grade of said Second Street to the heighth of two or three feet or more; all in violation of the aforesaid ordinance and the ordinances of said City, well knowing that the said defendant company or any

person or persons for them neglect and refuse to pay the aforesaid mentioned judgment or any part thereof or to duly compensate the said property owner for damages he has sustained by reason of the construction of said railroad and which said railroad companies, its successors, and assigns, have agreed to pay when they accepted the privileges and benefits of said ordinance.

34 Wherefore, your complainant prays and demands judgment against the defendants, The Kansas City Northwestern Railroad Company and the City of Leavenworth for the sum of Three thousand dollars ($3000.00) with interest thereon at the rate of six (6) per cent. per annum, from the 15th day of May, 1897, until paid and for costs of suit and your complainant further prays that said defendant the Kansas City Northwestern Railroad Company be required to pay the amount aforesaid as provided for by the orders, and decrees, deeds, etc., mentioned aforesaid, and that if it fails so to do that a receiver be appointed to take charge of its property, railroad cars, franchises equipments, etc., and manage, collect and run same under the order of the court, until sufficient funds have been collected to pay the amount with interest thereon as aforesaid, or that it be permanently enjoined and restrained from operating its said railroad over that part and portion of plaintiff's land appropriated as aforesaid, and from operating and maintaining said embankment across said Second street, in front of said plaintiff's property until it pays, or some person or persons for them, the aforesaid mentioned amount and compensate said plaintiff for the damage and property taken by the aforesaid mentioned Railroad Company and which obligations the said defendant in its purchase accepted and agreed to assume, and that if it is found in determining and adjudicating the rights of the parties hereto that other persons, parties or corporations have some interest herein, and that they are necessary parties to a complete adjudication and decision of the matters hereof, that they be brought in and made parties defendant and be required to set up their claim, if any and have all their rights and interest in the premises adjudicated and that they be declared junior and inferior to the rights, claims, and demands of the plaintiff herein and for all such other and further relief as in equity and good conscience the plaintiff may be entitled to in the premises.

JOHN H. ATWOOD AND
W. W. HOOPER,
Solicitors for Plaintiff.

____ ____,
Of Counsel.

35 UNITED STATES OF AMERICA,
District of Kansas, State of Kansas,
County of Leavenworth:

Frederick Zimmerman being first duly sworn depose- and says that he is the administrator of the estate of L. Zimmerman, deceased, and that he is the complainant in the foregoing bill of complaint,

and has read the same and knows the contents thereof; that the said bill is true of his own knowledge, except as to the matter stated to be on information and belief and as to this affiant verily believes it to be true.

FREDERICK ZIMMERMAN.

Subscribed and sworn to before me this 7th day of December A. D. 1899.

[SEAL.] LEE BOND,
Notary Public.

My Commission expires Sept 15th. 1902.

36 UNITED STATES OF AMERICA:

Be it remembered, That at the April Term A. D. 1897 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the City of Leavenworth, commencing on Monday the 19th day of April, A. D. 1897, Present the honorable Louis A. Myers, Judge, J. H. Rothenberger Sheriff, of Leavenworth county, Kansas and James Gray, Clerk: the following proceedings were had to-wit:

SATURDAY, *May 15th, A. D.* 1897.

Court met pursuant to adjournment.
Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

Now on this 15th day of May A. D. 1897 and during the regular April Term of the District Court of Leavenworth County, Kansas, came on for hearing the defendant's motion for a new trial in the above entitled action; the plaintiff being present by his attorneys Baker Hook & Atwood and the defendant by its attorneys W. P. Waggener and C. F. W. Dassler and the matters and things having been submitted to the court and after arguments of counsel the said motion for a new trial is overruled, defendant excepting, and Thereupon it is ordered adjudged and decreed that the said plaintiff do have and recover judgment of and from said defendant, for the sum of Three Thousand ($3000.00) dollars and for $— costs of suit and that execution issue therefor.

On application of the defendant the time within which to make and serve a case-made for the Supreme Court is hereby extended ninety (90) days from this date and the plaintiff is allowed 20 days thereafter in which to suggest amendments and the same to be settled on five days' notice by either party.

37 UNITED STATES OF AMERICA:

Be it remembered, That at the April Term A. D. 1898 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State begun and held in the City of Leavenworth, commencing on Monday the 18th day of April A. D. 1898, Present the honorable Louis A. Myers, Judge, Peter Everhardy, Sheriff of Leavenworth County, Kansas and James Gray, Clerk; the following proceedings were had to-wit:

SATURDAY, *May 7th, A. D.* 1898.

Court met pursuant to adjournment.
Present as before.

No. 10568.

L. ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

And now on this 7th day of May A. D. 1898 comes Fred Zimmerman, Administrator of the estate of L. Zimmerman deceased, by Baker Hook & Atwood, his attorneys and thereupon came on for hearing the motion of the said administrator heretofore filed herein to revive in the name of Fred Zimmerman as administrator of the estate of L. Zimmerman, deceased, this action and the judgment heretofore rendered in this action, on May 15th, 1897 in favor of the plaintiff, L. Zimmerman and against the defendant The Kansas City Wyandotte and N. W. R. R. Co.; and it appearing to the court that he defendant herein has been duly and legally served with a notice of said motion and that they failed to appear either in person or by an attorney or to show any cause why said motion should not be sustained.

It is therefore now by the court considered ordered and adjudged that Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased be and he is hereby substituted as plaintiff herein with all the rights of the said plaintiff and that this action
38 and the orders and judgment rendered herein stand revived and hereafter proceed in the name of the said Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased and that he as such administrator have and recover of and from said defendant herein the sum of $3000.00 with interest thereon at the rate of 6% per annum from the 15th day of May 1897 until paid and also the costs in this suit and that execution issue therefor.

STATE OF KANSAS, *Leavenworth County, ss:*

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county

aforesaid, do hereby certify the above and foregoing to be — true full and complete copy of the journal entry of the order of court reviving this action and judgment in name of Fred Zimmerman as administrator of the estate of L. Zimmerman, in the therein entitled cause, as the same remains of record in my office.

Witness my hand and the seal of said court affixed at my office in the City of Leavenworth, this the 24th day of May A. D. 1899.

JAMES GRAY, *Clerk,*
By J. H. KIRMEYER,
Deputy Clerk.

39 *Ordinance No.* 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth and Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:—

SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company for a period of 20 years from and after the passage of this ordinance; over and upon the following streets and public grounds of the city of Leavenworth, to-wit: Across Limit street on the Southern boundary of the city; also across Second street at some point south of the north line of Maple street; also over the south levee, front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth and Olathe Railroad Company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said right of way, such company or companies to pay the Leavenworth & Olathe Railroad Company a proportionate amount of the costs of the construction and maintainance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use to be determined by representatives one to be selected by each company and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad company neglects to name its representative, then the mayor and council of this city shall designate another arbitrator who shall act with the others in determining the points of difference. Said
40 Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same and when practicable,

shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same shall be determined by the engineer of said company and the city engineer and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance all rights under this ordinance shall be forfeited without further action on the part of the city.

Provided That if said company shall be delayed in the construction of its said road in the city of Leavenworth by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have within which to construct its said track, one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall by writing accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD, *City Clerk.*

Passed November 17th A. D. 1886.
Published November 18th A. D. 1886.

41 Endorsed: No. 7719. Fred Zimmerman, administrator &c. *vs.* Kansas City Wyandotte and Northwestern R. R. Co. *et al.* Recast and Amended Complaint. In Equity. Filed Dec. 8, 1899 Geo. F. Sharitt, clerk.

42 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL., Defendant-.

Upon the application of the complainant herein, leave is hereby given to him to amend his recast and amended complaint, filed

herein, on December 8, 1899, by attaching thereto his verification thereof, instanter, which is done.

WILLIAM C. HOOK, *Judge.*

December 20, 1899.

Endorsed: No. 7719. Order. Filed Dec. 20, 1899. Geo. F. Sharitt, clerk.

43 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

The Demurrer of the Kansas City Northwestern Railroad Company, Defendant, to the Recasted and Amended Bill of Complaint of Frederick Zimmerman, Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

This defendant, by protestation, not confessing, or acknowledging all or any of the matters and things in said complainant's recasted and amended bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth,—that the said complainant has not, in and by said recasted and amended bill, made or stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

2. That it appears by the complainant's own showing by the said recasted and amended bill of complaint, that he is not entitled to the relief prayed by the bill against this defendant.

3. That the said recasted and amended bill of complaint is exhibited against this defendant, and against the City of Leavenworth as a defendant upon several distinct and independent matters and causes, which have no relation to each other, and in which, or in the greater part of which this defendant is in no way interested or concerned and ought not to be implicated.

4. That the said recasted and amended bill is exhibited not
44 only against this defendant, but also against the City of Leavenworth, which is a municipality of the State of Kansas and a citizen and resident of the State of Kansas and, this court has no jurisdiction in this suit over said city, and by reason of making the said City of Leavenworth a defendant, the said recasted and amended bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof, and by joining the separate and distinct matters together which do not

depend upon each other, the proceedings in the progress of the said suit will be intricate and prolix, and this defendant put to unnecessary charges and expenses in matters which in no way relate to or concern it.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make further or other answer to the said recasted and amended bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

WAGGENER, HORTON & ORR,
Solicitors for the Kansas City Northwestern Railroad Company, Defendant.

ALBERT H. HORTON,
Of Counsel.

STATE OF KANSAS, *County of Shawnee, ss:*

Albert H. Horton makes solemn oath, and says that he is an attorney and agent of the Kansas City Northwestern Railroad Company one of said defendants, and that the foregoing demurrer is not interposed for delay.

ALBERT H. HORTON.

Sworn to and subscribed before me this 30th day of December A. D. 1899.

[SEAL.] D. H. MARTIN,
Notary Public.

My Commission expires Sept. 6th, 1903.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. HORTON,
Of Counsel for the Kansas City Northwestern Railroad Company, Defendant.

45 Endorsed: No. 7719. U. S. Circuit Court. Frederick Zimmerman administrator &c. *v.* Kansas City N. W. Railroad Company, *et al.* Demurrer to the Re-casted and amended Bill of Complaint. Filed Dec. 30, 1899. Geo. F. Sharitt Clerk. Waggener, Horton & Orr, for K. C. N. W. R. R. defendant.

46 STATE OF KANSAS, *Leavenworth County, ss:*

In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

THE KANSAS CITY & NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Now comes the City of Leavenworth especially appearing for the purposes of this motion only, and objects to this court assuming juris-

diction of this cause so far as the defendant, The City of Leavenworth is concerned, for the reason that the defendant, The City of Leavenworth is a City of the first class in the State of Kansas, having been joined as one of the defendants in this cause and that plaintiff is also a citizen of the State of Kansas, and moves the court to remand this cause to the District Court of Leavenworth county.

JNO. T. O'KEEFE,
Attorney for Defendant The City of Leavenworth Especially Appearing for the Purposes of this Motion Only.

Endorsed: No. 7719 Fred Zimmerman *vs.* The Kansas City and Northwestern Ry. Co. and The City of Leavenworth Motion of City of Leavenworth to remand Filed Oct. 16, 1900 Geo. F. Sharitt, clerk.

47 In the U. S. Circuit Court for the District of Kansas.

No. —.

FREDERICK ZIMMERMAN, Administrator of the Estate of Leonard Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILWAY COMPANY and THE CITY OF LEAVENWORTH, Def'ts.

Order.

On this 18th day of April, 1901 came the complainant herein by W. W. Hooper his attorney and also came the defendant the Kansas City Northwestern Railway Company by Albert H. Horton Esq., its attorney and thereupon the complainant dismissed from this cause without prejudice the defendant the City of Leavenworth.

Now therefore, it is by the court ordered that the defendant the City of Leavenworth be dismissed from this without prejudice and that it have and recover of and from complainant all its costs herein taxed at $—.

Thereupon and on the application of the defendant the Kansas City Northwestern Railway Company leave is hereby given said defendant to withdraw its demurrer heretofore filed herein, which is done.

And upon the application of the complainants and for good cause shown leave is hereby given him to file an amended Bill of Complaint herein within thirty days from this time and the defendant is hereby given thirty days thereafter to plead answer or demurrer thereto defendant excepts however to the jurisdiction of this court in this cause.

JNO. F. PHILLIPS, *Judge.*

Endorsed: No. 7719 Zimmerman *vs.* K. C. N. W. Ry. Order. Filed Apl. 18, 1901 Geo. F. Sharitt, clerk.

48 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Amended Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division:

1. Your complainant, Frederick Zimmerman, Administrator of the estate of L. Zimmerman, deceased, and a resident and citizen of Kansas, brought his action in the District Court of Leavenworth county, against the above named defendant, The Kansas City, Northwestern Railroad Company, and the City of Leavenworth, also residents and citizens of the State of Kansas, and upon the petition of the Defendant, The Kansas City, Northwestern Railroad Company, claiming that this controversy involved the construction of orders, judgments and decrees of this court rendered and entered in the case of the Farmers Loan & Trust Company of New York, against the Kansas City, Wyandotte & Northwestern Railroad Company being case numbered — of this court, the same was ordered removed from the District court of said county to this Circuit Court of the United States for the District of Kansas, and a transcript of the record of said District court was filed in said circuit court on the 18th day of July, 1899, and assigned to the [quity] division of this court and upon leave first had and obtained from said court, and by and with the consent of the said defendants, leave was given complainant to amend, recast and file his pleadings so as to conform to the -quity practice thereof. That thereafter and on the 19th day of April, 1901, your said complainant dismissed from this cause without prejudice, the city of Leavenworth, and at the same time leave was given the said complainant to file this, his amended bill of complaint herein within thirty days from said date.

Your complainant further alleges that Leonard Zimmerman died in Leavenworth County, Kansas, on the 9 day of July, 1897, and that said complainant is the duly appointed, authorized, qualified and acting Administrator of the estate of said Leonard Zimmerman and has been such ever since the 16 day of July, 1897, long prior to the commencement of this action, and that the Kansas City, Northwestern Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the state of Kansas, and own a railroad, engines, cars, etc., and is operating the same into and through the County and City of Leavenworth and through other counties and cities in said state acquired and operated as hereinafter stated.

3. Your complainant further avers that on the 8th day of October,

1872, the Kansas City, Wyandotte & Northwestern Railway Company a corporation was duly organized and chartered for the purpose of constructing and maintaining a railroad and telegraph lines in connection therewith, and the business of said railroad company was to be transacted in the counties in the State of Kansas, through which said railroad and telegraph lines passed; and that on the 27th day of September, 1886 the Leavenworth & Olathe Railroad Company, a corporation was duly organized and chartered for the purpose of constructing and maintaining and operating a standard and broad *gua*ged railroad extended and intended to be run through and from the City of Leavenworth in the County of Leavenworth, Kansas, then southwesterly through the counties of Leavenworth, Wyandotte and Johnson to the City of Olathe, in the last named county.

4. Your complainant further avers that after the organization and chartering of the aforesaid companies, they proceeded to condemn and lay out a right of way and build a railroad through and into the City and county of Leavenworth; that before the completion thereof, and to-wit on the 29th day of March 1887, The Said Kansas City, Wyandotte & Northwestern Railway Company, and the Leavenworth & Olathe Railroad Company consolidated under the laws of the State of Kansas, as the Kansas City Wyandotte &
49 Northwestern Railroad Company, and in the articles of consolidation, the Kansas City, Wyandotte & Northwestern Railroad Company in writing accepted all the rights and privileges and assumed all obligations and liabilities of every nature and kind of the aforesaid companies, The Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company; that thereafter said Kansas City Wyandotte & Northwestern Railroad Company took possession and charge of all the property, rights and franchises of the aforesaid two companies, and accepted all the rights, franchises and privileges, and assumed all the obligations and liabilities of the aforesaid two companies, and proceeded to complete, construct and build said railroad.

5. Your complainant further avers that said Leonard Zimmerman in his lifetime was the owner of fractional lot seven (7) in Block seven (7) and lots six (6) and seven (7) in Block eight (8) all in Fackler's addition to the City of Leavenworth, Leavenworth county, Kansas; that Second Street, was a duly laid out and established graded street in said City of Leavenworth, running north and south, and running between Blocks seven (7) and eight (8); Block seven (7) lying on the east side of Second Street; and Block eight (8) on the west side of said Second street that said Zimmerman's property, to-wit, Lot seven (7) faces Second Street on the east, and said lot six (6) and fractional Lot seven (7) face said Second street on the west, and that said Zimmerman owned said lots and the grade of said street was established long prior to the acquiring of any right of way by said companies; or either of them.

6. Your complainant further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights aforesaid, proceeded to finish, construct and build its road in a northeasterly direction through the City of Leavenworth until it

came to a point on the south line of fractional lot seven (7) of said Zimmerman's property, and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractional Lot seven (7) and constructed its railroad in the same direction across and over that part and portion of said Second Street immediately in front of said L. Zimmerman's property mentioned aforesaid; graded, raised and made a high embankment of a permanent nature, the whole width of said Second Street, and placed iron rails thereon, and thereby changed and raised the established grade of Second street, as long prior thereto established by said City of Leavenworth, to a great heighth, to-wit, three feet, immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money, as will more fully appear hereafter.

7. Your complainant further avers that on the 2nd day of February, 1889, said L. Zimmerman, now deceased, began his action against said Kansas City, Wyandotte & Northwestern Railroad Company, in the District Court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs and that on the 15th day of May, 1897, he duly recovered in the above entitled court and cause judgment against the defendant, said Kansas City Wyandotte & Northwestern Railroad Company, for the sum of Three Thousand Dollars ($3,000.00) with interest thereon from said date at the rate of 6 per cent. per annum until paid, for damages sustained by reason of the appropriation of his land, and the construction of the railroad as aforesaid, which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

8. Your complainant further avers that afterwards and on the 7th day of May, 1898, said action and judgment was duly revived as provided by law, in the name of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true copy of the judgment order of revivor hereto attached, made a part hereof, and marked "Exhibit B."

50 Your complainant further avers that during this time and about January 2, 1888, the Kansas City, Wyandotte & Northwestern Railroad Company executed and delivered to the Farmer's Loan & Trust Company of New York, a deed of trust, or mortgage, on its said railroad, right of way, tracks, equipments and franchises, that is, such of its said railroad, right of way, tracks, improvements, equipments and franchises as it owned, and had paid for and acquired at the time of the execution of said deed of trust, or mortgage.

9. And your complainant further avers that at the time of the execution and delivery of said deed of trust, or mortgage, to said Farmer's Loan & Trust Company, of New York, the said Kansas City, Wyandotte & Northwestern Railroad Company, had not acquired the title to the right of way over the land and the street immediately in front of said premises appropriated as aforesaid, and had not compensated said property owner for the damages sustained

by him as aforesaid, and that at the time of the execution of said deed of trust, or mortgage, the said Kansas City, Wyandotte & Northwestern Railroad Company had no title to said right of way, and could not give any lien thereon, that was prior and paramount to the claim and lien of said L. Zimmerman, for compensation for the land appropriated and damages sustained by him as above stated, and that the said Farmer's Loan & Trust Company did not, under and by virtue of their deed of trust, or mortgage, acquire any lien, right or title that is prior to the lien, claim and right of said plaintiff, to be compensated for his land appropriated and the damages sustained by him as above stated.

10. Your complainant further avers that on or about March 31st, 1890, the said Farmer's Loan & Trust Company of New York, commenced its action in the Circuit Court of the United States for the District of Kansas, to foreclose its said deed of trust, or mortgage, and that on or about the 18th day of June, 1893, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company, foreclosing said deed of trust, or mortgage, and ordering that said property, described in said deed of trust or mortgage be sold, unless within some short time thereafter in said decree mentioned, said railroad company, or some person or persons for it should pay the amount of said mortgage indebtedness, with the expenses and costs thereof; that thereafter and on or about the — day of ——, 1894, said property was sold to George C. Smith, and B. P. Waggener, who were the agents and purchasing trustees for the said defendant Company.

11. Your complainant further avers that after making of said sale, the Master making the same duly made his report thereon, and on the 9th day of April, 1894, upon the consideration of such report said sale was confirmed by said court and which said order of confirmation among other matters contained the following provision:

"And said master commissioner is ordered and directed to make the purchasers at said sale, to-wit, George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report, to such purchasers, said report being confirmed, however, subject to the provisions of said original decree and subject to the provisions to be contained in the deed executed by said master commissioner to said purchasers."

12. Your complainant further avers that afterwards and in consummation of said sale a deed was executed by the master to said George C. Smith and B. P. Waggener, the purchasers at said sale, conveying to them the premises mentioned in said foreclosure decree which deed was on the 18th day of June, 1894, approved by the court subject to certain conditions set forth in the order of approval, which order was written or a part thereof upon the original deed and is in the following words and figures:

"The foregoing deed examined and approved subject to the condition that the purchaser take the property subject to all orders of the court relating to the payment of the debts of the company, and

the receiver, and said property shall remain liable for such debts, if any there are remaining unpaid."

HENRY C. CALDWELL,
U. S. Circuit Judge.

51 which deed was thereupon entered upon the records in the office of the Register of Deeds of Leavenworth County, Kansas, and thereafter said George C. Smith and B. P. Waggener, conveyed said property to the defendant, The Kansas City, Northwestern Railroad Company, for whom they were acting as Trustees, and your complainant further avers that said company has no right, title or interest in or to such property save and except as it acquired by said conveyance.

13. Your complainant further avers that said B. P. Waggener, one of the purchasing Trustees at such foreclosure sale, was at the time of the beginning of the foreclosure proceedings mentioned above, and at the time of purchasing the property at such sale, the general attorney and counsellor for the Kansas City, Wyandotte & Northwestern Railroad Company, and was one of the attorneys of record for the defendant in the action in which said L. Zimmermen, now deceased, recovered judgment against the Kansas City, Wyandotte & Northwestern Railroad Company, as mentioned above, and at the execution and approval of the deed conveying to the said trustees said premises and the deed to said defendant, was still such attorney, and had actual knowledge of the pendency of said action in the District Court of Leavenworth County, Kansas, and of the nature and extent thereof and what was claimed by said plaintiff in said action, and well knew that said plaintiff had not been compensated for his land appropriated and the damages sustained by him in such appropriation, and the construction of such embankment, and the changing of the established grade of such street, immediately in front of said premises, and said trustees, nor said defendant company, are not innocent purchasers of said right of way, etc., for value, they at all times having knowledge and notice of said plaintiff's claims.

14. Your complainant further avers that he is the representative of judgment creditor of the Kansas City, Wyandotte & Northwestern Railroad Company, and one of the persons in whose favor the reservation and provision as embodied in the orders, decrees, judgments, orders of confirmation and deed mentioned aforesaid, and said orders, decrees, judgments order of confirmation, and deed are records of this court and complainant refers to them and prays that he may use them as part hereof or so much thereof as is deemed pertinent to the issues herein, as if they had been fully set out.

15. Your complainant further avers that on this 17th day of November, 1886, the aforesaid Leavenworth & Olathe Railroad Company, procured the Mayor and Council of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the City of Leavenworth, and that in said ordinance said Leavenworth, and Olathe Railroad Company was granted the right to cross Second Street at some point south of

the north line of Maple Street; also over the south levee, Front street, and the south Esplanade, from the south line of Fackler's Addition to the north line of Spruce, etc., and that as a condition for the grant and privilege mentioned in said ordinance, it was provided that in all such cases "where the grade of any street or public ground is changed by said company or its successors, it shall protect the City from cost and damage at the suits of the property owners;" all of which will more fully appear by a true copy of said ordinance hereto attached and made a part hereof and marked "Exhibit C."

16. Your complainant further avers that on or about the 19th day of January, 1887, said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance; and that in and by the articles of consolidation mentioned aforesaid, The Kansas City, Wyandotte & Northwestern Railroad Company, assumed accepted and agreed to all the terms, obligations and conditions of said ordinance and that under and by virtue of taking possession of said railroad and its tracks and continuing to operate the same over said plaintiff's premises appropriated and taken as aforesaid, the decree of foreclosure and the purchase aforesaid, and of accepting and operating said rail-
52 road under and by virtue of the ordinance of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, The Kansas City Northwestern Railroad Company, has become liable to said plaintiff for the amount of said judgment with interests and costs.

17. Your complainant further avers that long before the above judgment was obtained all the property of the Kansas City Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, The Kansas City Northwestern Railroad Company, and that under and by virtue of taking possession of the right of way and operating its trains and cars over the land appropriated and across said street immediately in front of said premises, and continuing to keep possession and operating its tra-ns thereon and of said decrees and the ordinances of the said city, said defendant, The Kansas City Northwestern Railroad Company has assumed and become obligated to pay off any and all obligations of the said Kansas City, Wyandotte & Northwestern Railroad Company to said plaintiff for its right of way, and that under and by virtue thereof, the Kansas City, Wyandotte & Northwestern Railroad Company has turned over to said defendant railroad company all of its property rights and franchises, and has no property of any kind or description subject to execution and has refused to pay any part or portion of said judgment and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company, and that the said Kansas City, Wyandotte & Northwestern Railroad Company, and defendant, Kansas City Northwestern Railroad Company neglect and refuse to pay the aforesaid judgment or any part thereof, although often thereunto requested.

In consideration whereof and for as much as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly recognizable and reviewable.

To The End Therefore, that your orator may have that relief which he can only obtain in a court of equity, and that the said defendant may answer the premises but not upon oath or affirmation, the benefit of which is expressly waived by your orator, now prays the court that a decree be rendered against the defendant, the Kansas City Northwestern Railroad Company for the sum of Three Thousand Dollars ($3,000.00) with interest thereon at the rate of six per cent. per annum from the 15th day of May, 1897, until paid, and for costs of suit, and your complainant further prays that said defendant The Kansas City, Northwestern Railroad Company, be required to pay the amount aforesaid, within some short time to be mentioned in said decree, and that if it fails to so do, that a Receiver be appointed to take charge of its property, railroad cars, franchises, equipments, etc., and to manage, collect and run same under the order of the court, until sufficient funds have been collected to pay said amount, with interest thereon as aforesaid, or that it be permanently enjoined and restrained from operating its said railroad over that part or portion of plaintiff's land appropriated as aforesaid, and from operating and maintaining said embankment across said Second street in front of said plaintiff's property until it pays, or some person or persons for them, the aforesaid mentioned amount and compensate said plaintiff for the damage and property taken by the aforesaid mentioned railroad company, and which obligations, the said defendant in its purchase and otherwise assumed and that if it is found in determining and adjudicating the rights of the parties hereto that other persons, parties, or corporations, have some interest herein and that they are necessary parties to a complete adjudication and decision of the matters hereof, that they be brought into court and made parties defendant and be required to set up [they] claim, if any, and have all their rights and interests in the premises adjudicated and that they be declared junior and inferior to the rights, claims and demands of the plaintiff herein, and for all such
53 other and further relief as in equity and good conscience the plaintiff may be entitled to in the premises.

WILLIAM W. HOOPER,
Solicitor for Plaintiff.

JNO. H. ATWOOD,
Of Counsel.

To the end that your orator may obtain the relief to which he is justly entitled in the premises he now prays the court to grant him due process by subpœna directed to the Kansas City Northwestern Railroad Company defendant hereinbefore named requiring and commanding it to appear herein and answer but not under oath, the same being expressly waived the several allegations in this your orator's bill of complaint contained.

——— ———,
Solicitor for Plaintiff.

——— ———,
Of Counsel.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

On this 8th day of May, 1901, before me, personally appeared Frederick Zimmerman, the above named plaintiff who made solemn oath that he read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true, of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

FREDERICK ZIMMERMAN.

Subscribed and sworn to before me this 8th day of May, 1901.

[SEAL.] J. H. ATWOOD, JR.,
Notary Public.

My Commission expires Dec. 26th, 1904.

"EXHIBIT A."

UNITED STATES OF AMERICA:

Be It Remembered, That at the April Term A. D. 1897 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said state, begun and held in the City of Leavenworth, commencing on Monday the 19th day of April A. D. 1897. Present the honorable Louis A. Myers, Judge, J. H. Rothenberger Sheriff of Leavenworth County, Kansas, and James Gray Clerk; the following proceedings were had to-wit:

SATURDAY, *May 15th, A. D.* 1897.

Court met pursuant to adjournment.
Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

Now on this 15th day of May A. D. 1897 and during the regular April Term of the District Court of Leavenworth county, Kansas came on for hearing the defendant's motion for a new trial in the above entitled action; the plaintiff being present by his attorneys Baker Hook & Atwood and the defendant by its attorneys W. P. Waggener and C. F. W. Dassler and the matters and things having been submitted to the court and after arguments of counsel the said motion for a new trial is overruled, defendant excepting, and Thereupon it is ordered adjudged and decreed that the said plaintiff do have and recover judgment of and from said defendant, for the sum of Three thousand ($3000.00) Dollars and for $— costs of suit and that execution issue therefor.

On application of the defendant the time within which to make and serve a case-made for the Supreme court is hereby extended

ninety (90) days from this date and the plaintiff is allowed 20 days thereafter in which to suggest amendments and the same to be settled on five days notice by either party.

54 "EXHIBIT B."

UNITED STATES OF AMERICA:

Be It Remembered, That at the April Term A. D. 1898 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the city of Leavenworth, commencing on Monday the 18th day of April A. D. 1898, Present the honorable Louis A. Myers, Judge, Peter Everhardy Sheriff of Leavenworth County, Kansas, and James Gray Clerk; the following proceedings were had to-wit:

SATURDAY, *May 7th, A. D.* 1898.

Court met pursuant to adjournment.
Present as before.

No. 10568.

L. ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COMPANY, Defendant.

And now on this 7th day of May A. D. 1898 comes Fred Zimmerman, Administrator of the estate of L. Zimmerman deceased, by Baker Hook & Atwood his attorneys and thereupon came on for hearing the motion of the said administrator heretofore filed herein to revive in the name of Fred Zimmerman as administrator of the estate of L. Zimmerman, deceased, this action and the judgment heretofore rendered in this action, on May 15th 1897 in favor of the plaintiff, L. Zimmerman and against the defendant The Kansas City Wyandotte and N. W. R. R. Co.; and it appearing to the court that the defendant herein has been duly and legally served with a notice of said motion and that they failed to appear either in person or by an attorney or to show any cause why said motion should not be sustained.

It is therefore now by the court considered ordered and adjudged that Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased be and he is hereby substituted as plaintiff herein with all the rights of the said plaintiff and that this action and the orders and judgment rendered herein stand revived and hereafter proceed in the name of the said Fred Zimmerman as Administrator of the estate of L. Zimmerman deceased and that he as such administrator have and recover of and from said defendant herein the sum of $3000.00 with interest thereon at the rate of 6% per annum from the 15th day of May 1897 until paid and also the costs in this suit and that execution issue therefor.

STATE OF KANSAS, *Leavenworth County, ss:*

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be — true, full and complete copy of The Journal Entry of the order of Court reviving this action and judgment in name of Fred Zimmerman as administrator of the estate of L. Zimmerman in the therein entitled cause, as the same remains of record in my office.

Witness my hand, and the seal of said court affixed at my office in the City of Leavenworth, this the 24th day of May A. D. 1899.

[SEAL.] JAMES GRAY, *Clerk,*
By J. H. KIRMEYER,
Deputy Clerk.

"EXHIBIT C."

Ordinance No. 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth and Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:

55 SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company for a period of 20 years from and after the passage of this ordinance; over and upon the following streets and public grounds of the City of Leavenworth, to-wit: Across Limit Street on the Southern boundary of the city; also across Second street at some point south of the north line of Maple street; also over the south Levee, Front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth and Olathe Railroad company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said right of way, such company or companies to pay the Leavenworth & Olathe Railroad company a proportionate amount of the costs of the construction and maintenance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use to be determined by representatives one to be selected by each company and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad Company neglects to name its representative, then the mayor and council

of this city shall designate another arbitrator who shall act with the others in determining the points of difference. Said Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same and when practicable shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same shall be determined by the engineer of said company and the city engineer and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance all rights under this ordinance shall be forfeited without further action on the part of the city. Provided That if said company shall be delayed in the construction of its said road in the city of Leavenworth by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have within which to construct its said track, one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall by writing accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD,
City Clerk.

Passed November 17th A. D. 1886.
Published November 18th A. D. 1886.

Indorsed: 7719. Frederick Zimmerman adm'r etc. *vs.* The Kansas City Northwestern Railroad Co. Amended Bill of Complaint. Filed May 9, 1901. Geo. F. Sharitt, Clerk.

56 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

v.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

The Demurrer of the Kansas City Northwestern Railroad Company, Defendant to the Amended Bill of Complaint of Frederick Zimmerman, Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's amended bill of complaint to be true in such manner and form as the same are therein set forth, and alleged, doth demur thereto, and for cause of demurrer showeth—that the said complainant has not, in and by said amended bill, made or stated such a cause of action as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

2. That it appears by the complainant's own showing by the said amended bill of complaint, that he is not entitled to the relief prayed for by the bill against this defendant.

3. That it appears from said amended bill of complaint that this suit was originally commenced in the District Court of Leavenworth county in the State of Kansas, to enforce certain alleged orders, judgments and decrees of this court rendered and entered in the case of The Farmers Loan & Trust Company of New York *v.* The Kansas City, Wyandotte & Northwestern Railroad Company, numbered in this court 6472, when said District court of Leavenworth county, Kansas, had no jurisdiction over said orders, judgments of decrees of

57 this court, and no power or authority to enforce or construe the same, and as said action or suit brought by the complainant in the District Court of Leavenworth county, Kansas, against this defendant was removed from said court to this court, this court upon said removal could not and would not have in this suit any other jurisdiction or power than that of the District Court of Leavenworth county, Kansas, in said suit, and hence, as this case was brought into this court from the state court, this court has no power upon the amended bill of complaint to enforce the said orders, judgments and decrees described and referred to in the petition originally filed in said court by the complainant against this defendant.

4. Upon the allegations of the said bill of complaint, including the orders decrees and judgments of this court described in the 14th paragraph of said amended bill, and which said orders, decrees and judgments are a part of said amended bill the same as if they had been fully set out and copied therein, the complainants are not en-

titled to any preference over the mortgage debts embraced in the mortgage referred to in said bill of January 2nd, 1888, and therefore the defendant is not liable for any part or portion of the judgment referred to in said amended bill of complaint against the Kansas City, Wyandotte & Northwestern Railroad Company.

5. As it appears from the amended bill of complaint, and the orders, decrees, orders of confirmation and deed mentioned therein as a part thereof, and as being rendered and entered in this court in Case No. 6472 of The Farmers Loan & Trust Company *v.* The Kansas City, Wyandotte & Northwestern Railroad Company, that said alleged judgment of May 15th, 1897 of Leonard Zimmerman *v.* The Kansas City Wyandotte & Northwestern Railroad Company for damages is not a preferential claim or debt contracted by the mortgagor company over the said mortgage of January 2nd, 1888, nor any claim contracted by the receiver in that suit or arising out of that suit, said defendant is not liable therefor, nor for any part thereof.

58 6. It does not appear in or from the averments of said amended bill that the said complainant is entitled, equitably or otherwise, from this defendant, to the payment of said sum of $3000 referred to in said judgment of May 15th, 1897, of Leonard Zimmerman *v.* The Kansas City Wyandotte & Northwestern Railroad Company.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make further or other answer to the said amended bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

WAGGENER, HORTON & ORR,
Solicitors for the Kansas City Northwestern Railroad Company, Defendant.

ALBERT H. HORTON, *of Counsel.*

STATE OF KANSAS, *County of Shawnee, ss:*

Albert H. Horton makes solemn oath and says that he is an attorney and agent of the Kansas City Northwestern Railroad Company, one of said defendants, and that the foregoing demurrer is not interposed for delay.

ALBERT H. HORTON.

Subscribed and sworn to before me this 14" day of June A. D. 1901.

[SEAL.] D. H. MARTIN,
Notary Public.

My commission expires Sept. 6th, 1903.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. HORTON,
Of Counsel for the Kansas City Northwestern Railroad Company, Defendant.

Endorsed: No. 7719. U. S. Circuit Court. Frederick Zimmerman, adm'r, &c. Compl't *v.* K. C. N. W. R'l'd Co. *et al.* Def'ts. Demurrer to Amended Bill. Filed Jun. 15, 1901 Geo. F. Sharitt, clerk Waggener, Horton & Orr, for defendant.

59 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

v.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

On application of the defendant leave is given to withdraw its demurrer filed June 15th, 1901, to the amended bill of complaint and to substitute therefore a new and amended bill of demurrer to said bill of complaint.

JOHN A. RINER, *Judge.*

Indorsed: No. 7719. Order. Filed Oct. 12, 1903. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

v.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

The Amended Demurrer of the Kansas City Northwestern Railroad Company to the Amended Bill of Complaint of Frederick Zimmerman, Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's amended bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth—that the said complainant has not, in and by said amended bill, made or stated such a cause of action as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

2. That it appears by the complainant's own showing by the said amended bill of complaint, that he is not entitled to the relief prayed for by the bill against this defendant.

3. That it appears from said amended bill of complaint that this suit was originally commenced in the District Court of Leavenworth County in the State of Kansas, to enforce certain alleged orders, judgments and decrees of this Court rendered and entered in the case of The Farmers Loan & Trust Company of New York *v.* The Kansas City, Wyandotte & Northwestern Railroad Company, numbered in this court 6472, when said District Court of Leavenworth county, Kansas, had no jurisdiction over said orders, judgments or decrees of this court, and no power or authority to enforce or construe the same, and as said action or suit brought by the complainant in the District Court of Leavenworth County, Kansas, against this defendant was removed from said court to this court, this court upon said removal could not and would not have in this suit any other jurisdiction or power than that of the District Court of Leavenworth County, Kansas, in said suit, and hence, as this case was brought into this court from the state court, this court had no power upon the amended bill of complaint to enforce the said orders, judgments and decrees described and referred to in the petition originally filed in said court by the complainant against this defendant.

4. Upon the allegations of the said bill of complaint, including the orders, decrees and judgments of this court described in the 14″ paragraph of said amended bill, and which said orders, decrees and judgments are a part of said amended bill the same as if they had been fully set out and copied therein, the complainants are not entitled to any preference over the mortgage debts embraced in the mortgage referred to in said bill of January 2″, 1888, and therefore the defendant is not liable for any part or portion of the judgment referred to in said amended bill of complaint against the Kansas City, Wyandotte & Northwestern Railroad Company.

60 5. As it appears from the amended bill of complaint, and the orders decrees, orders of confirmation and deed mentioned therein as a part thereof, and as being rendered and entered in this Court in case No. 6472 of The Farmers Loan & Trust Company *v.* The Kansas City Wyandotte & Northwestern Railroad Company, that said alleged judgment of May 15″, 1897, of Leonard Zimmerman *v.* The Kansas City, Wyandotte & Northwestern Railroad Company for damages is not a preferential claim or debt contracted by the mortgagor company over the said mortgage of January 2″, 1888, nor any claim contracted by the receiver in that suit, or arising out of that suit, said defendant is not liable therefor, nor for any part thereof.

6. It does not appear in or from the averments of said amended bill that the said complainant is entitled, equitably or otherwise, from this defendant, to the payment of said sum of $3,000 referred to in said judgment of May 15″, 1897 of Leonard Zimmerman *v.* The Kansas City, Wyandotte & Northwestern Railroad Company.

7. That it appears in and by said amended bill that the liability of the said defendant The Kansas City Northwestern Railroad Company to the complainant, if any at all, is not enforce-able by said bill in an independent action such as complainant herein has brought,

but is enforc-able, if at all, in the original action in said amended bill mentioned, to-wit, the action by The Farmers Loan & Trust Company *v.* The Kansas City, Wyandotte & Northwestern Railroad Company to foreclose the mortgage executed by the said defendant to the said complainant in that cause and as ancillary to and a part of the relief which might have been or might be administered in said cause.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make further or other answer to the said amended bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

WAGGENER, DOSTER & ORR,
Solicitors for the Kansas City Northwestern Railroad Company, Defendant.

STATE OF KANSAS, *County of Shawnee, ss:*

Frank Doster makes solemn oath and says that he is an attorney and agent of the Kansas City Northwestern Railroad Company, one of said defendants, and that the foregoing demurrer is not interposed for delay.

FRANK DOSTER.

Subscribed and sworn to before me this — day of ——, 1903.

——— ———,
Notary Public.

My Commission Expires ——, ——.

Indorsed: No. 7719. United States Circuit Court. Frederick Zimmerman, Adm'r, *v.* K. C. N. W. Rld. Co. Amended Demurrer to Amended Bill. Filed Oct. 12, '03. Geo. F. Sharitt, clerk. Waggener, Doster & Orr, for K. C. N. W. R. R. Co.

61 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of Leonard Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Motion.

Now comes the above named plaintiff and moves the court to remand this case to the District court of Leavenworth county, Kansas, for the reason that this court has no jurisdiction to hear or try same.

JNO. H. ATWOOD, AND
WILLIAM W. HOOPER,
Attorneys for Complainant.

Indorsed: No. 7719. Frederick Zimmerman etc. *vs.* Kansas City N. W. R. R. Co. Motion. Filed Ap'l 14, 1904. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator,
vs.
KANSAS CITY NORTHWESTERN RAILROAD COMPANY.

Memoranda of Opinion.

The foundation of complainant's demand against the defendant railroad company is the judgment of three thousand dollars obtained by complainant's intestate against The Kansas City, Wyandotte and Northwestern Railroad Company in the state court. If complainant may compel satisfaction of that judgment, or any part of it, against the defendant railroad company as assignee of the purchasing committee which purchased the property of the Kansas City, Wyandotte and Northwestern Railroad Company at a foreclosure sale of that property, it is by reason of the terms of the decree entered in the federal circuit court under which the purchase was made and by reason of the terms of the deed based upon that decree by which the purchasing committee took title to the property. That decree referred to in complainant's amended bill of complaint, expressly provides, as follows:

"This court hereby reserves to itself from this decree the power and jurisdiction both as against the parties to this suit and as against said purchaser at said contemplated sale to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper, etc."

Hence, in my judgment, the district court of Leavenworth county, had no jurisdiction to either enforce the judgment in suit against the assignee of the purchaser under such decree or to determine the validity and extent of the judgment now in suit, or to establish such judgment as a lien on the property purchased under the decree superior to the mortgage liens therein foreclosed, and that this court by removal of this cause from the state court acquired only such jurisdiction and power to determine as the state court possessed and might have exercised had no removal been obtained. That the proper method of obtaining satisfaction of the judgment in suit from the defendant company or out of the property of the Kansas City, Wyandotte and Northwestern Railroad by it purchased under the decree, if any such may be obtained by complainant, is by intervention in the original foreclosure suit in which the decree relied upon by complainant was entered.

It follows, the motion to remand to the state court must be denied and the amended demurrer to the amended bill of complaint must be sustained, with leave to apply to this court for leave to
62 file an intervening petition in the original suit of The Farmers' Loan & Trust Company of New York against The Kansas City, Wyandotte and Northwestern Railroad Company, *et al.*, number 6472 equity on the dockets of this court.

JOHN C. POLLOCK, *Judge.*

Indorsed: No. 7719. Memo. of Opinion. Filed April 23, 1904. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator,
v.
KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL.

Order.

This cause having been heretofore on the — day of April, 1904, upon oral arguments by solicitors for complainant and defendant, made in open court, and upon written briefs submitted to the court upon motion to remand the cause to the state court, and upon the amended demurrer of defendant to complainant's amended bill of complaint, and by the court taken and held under advisement until this day, comes further on for hearing upon said motion and demurrer, and now on this 23d day of April, 1904, it is by the court considered and ordered that the motion of complainant to remand to the state court is denied, and the amended demurrer to the amended bill of complaint filed herein is sustained in accordance with a written memoranda of opinion this day filed in this cause and court.

JOHN C. POLLOCK, *Judge.*

Indorsed: No. 7719. Order. Filed April 23, 1904. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator, Complainant,
vs.
KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL., Defendant.

Order.

On this 25" day of April, A. D. 1904, upon the application of the complainant and for good cause shown, leave is hereby given said

complainant to file an amended bill within ten (10) days from this date.

JOHN C. POLLOCK, *Judge.*

Indorsed: No. 7719. Frederick Zimmerman Adm'r, etc. *vs.* Kansas City N. W. R. R. Co. Order. Filed April 25, 1904. Geo. F. Sharitt, Clerk.

63 In the Circuit Court of the United States for the District of Kansas.

FRED ZIMMERMAN, Adm'r,
vs.
KANSAS CITY N. R. R. Co.

Now comes the complainant herein, by Atwood and Hooper solicitors; and on motion it is ordered by the court, that the bill of complaint filed in this suit be and is now taken as confessed by defendant.

To the Clerk of said Court:

Enter the above in the order book in equity of said court.

ATWOOD AND HOOPER,
Solicitors for Complainant.

64 [Endorsed:] No. 7719. Zimmerman *vs.* K. C. N. R. R. Co. Order *pro Confesso.* Filed Oct. 3, 1904. Geo. F. Sharitt, Clerk.

65 In the Circuit Court of the United States for the District of Kansas, First Division.

Equity. No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
v.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Motion to Vacate Decree.

The defendant above named moves the court for an order vacating and setting aside the decree *pro confesso* made and entered in the above entitled cause on the 3" day of October, 1904, for the reason that, as shown by the record in said cause and the opinion of the court heretofore rendered in sustaining the defendant's demurrer to the complainant's bill, the said court was without jurisdiction in said cause to render or enter said decree *pro confesso.*

WAGGENER, DOSTER & ORR,
Solicitors for Defendant.

Endorsed: No. 7719. United States Circuit Court. Frederick Zimmerman, Admr., *v.* Kansas City, Northwestern Railroad Company. Motion to vacate decree. Filed Oct. 26, 1904. Geo. F. Sharitt, clerk Waggener, Doster & Orr, for defendant.

65 UNITED STATES OF AMERICA, *District of Kansas, ss:*

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the City of Leavenworth, in said District on Monday the 6th day of June, A. D. 1904, proceedings were had and appear of record, in words and figures as follows, to-wit:

THURSDAY, *October* 27, 1904.

7719.

FREDERICK ZIMMERMAN, Adm'r., etc.,
vs.
KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL.

The defendant's motion to vacate and set aside the decree *pro confesso* heretofore entered in this case on the 3d day of October, A. D. 1904, came on to be heard and was argued by counsel, the court having considered the same and being fully advised in the premises, it is by the court ordered that said order *pro confesso* be and the same is hereby set aside and held for naught.

67 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
v.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY ET AL., Defendant.

And now on this 25th day of June, 1906, the above entitled case coming on for hearing as set by the court, and complainant appearing by his attorney John H. Atwood, and the court having his attention directed to the fact that a mandate in said cause emanating from the United States Circuit Court of Appeals for the Eighth Circuit had been spread of record in the office of the Clerk of this court, which mandate requires a reversal of the judgment heretofore rendered herein, and an overruling of the demurrer heretofore sustained by this court, whose action in that regard was the occasion of the appeal from which said mandate emanates; and thereupon, the said complainant requested that the mandate be observed in the matter of overruling said demurrer; and thereupon it was by the court ordered and adjudged that said demurrer be overruled.

And thereupon the said complainant asked leave to withdraw the second amended bill of complaint from the files of this suit, which request is granted, and the same is hereby adjudged to have been withdrawn.

And thereupon the court directed that thirty days be given to the defendant to elect as to whether or not it will stand upon its demurrer and have final judgment rendered against it thereon, or whether it will elect to answer, and in the event that it elects to answer, sixty days is given said defendant in which so to do. To which order granting time to the defendant for election, is duly excepted to by complainant.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719. Order overruling demurrer, &c. Filed June 25, 1906. Geo. F. Sharitt, clerk.

68 In the Circuit Court of the United States for the District of Kansas, First Division. In Equity.

No. 7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Motion.

Now comes the complainant herein and moves the court to render a decree in his favor herein as prayed for in his bill of complaint upon the allegations of said bill and the mandate of the Circuit Court of Appeals heretofore filed and entered of record herein.

ATWOOD & HOOPER,
Solicitors for Complainant.

Endorsed: No. 7719. Frederick Zimmerman, etc., *vs.* K. C. N. W. Ry. Co. Motion for decree. Filed Sept. 18, 1906. Geo. F. Sharitt, clerk.

69 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of Leonard Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Order Pro Confesso.

1. On this 27th day of October, 1906 this cause came on to be heard at this term upon the bill of the complainant as last amended

and filed herein and it appearing that the amended bill in equity in the above entitled cause was filed in this court on May 9th, 1901 and that said defendant had duly entered its appearance and filed its demurrer thereto; that thereafter said demurrer came on for hearing and was, by this court, sustained, and was, by the complainant herein, duly appealed to the United States Circuit Court of Appeals for the Eighth Circuit; and that thereafter and on the 5th day of May, 1906 a mandate from the United States Court of Appeals was duly received and filed in this cause, which directed this court to reverse its decision on said demurrer and to overrule the same. That thereafter and on the 25th day of June, 1906 said matter came on for further hearing upon the mandate from said Court of Appeals and upon said day this court observed said mandate and overruled said demurrer of the defendant filed to the amended bill of complaint filed herein on the 9th day of May, 1901; and thereupon the said complainant asked leave to withdraw its second amended bill of complaint filed herein and leave to withdraw said bill of complaint was given at said time; and, upon the application of the defendant, thirty days' time was given said defendant to elect whether to stand by its demurrer and have final judgment rendered thereon or whether it would elect to answer; and in the event it elects to answer
70 sixty days from said last mentioned date was given said defendant in which to so do.

2. And it further appearing to the court that, at the expiration of said sixty days from said June 25th, 1906, said defendant had not entered any election, nor had it filed any answer to the amended bill of complaint filed as heretofore stated, nor has it any answer herein; and it further appearing to the court that on the 18th day of September, 1906 the said complainant filed its motion for a decree as prayed for in his said bill and this court having heretofore set said cause for hearing upon the day as aforesaid, came the complainant herein by Atwood and Hooper, his attorneys, and also came the defendant herein by Frank Doster its attorney, and thereupon came on for hearing the trial of this cause as asked for in said motion.

3. Thereupon the said defendant asked leave of court to refile its demurrer to said amended bill and the court, upon being advised in the premises, granted leave to said defendant to refile its demurrer, the same however, to be without prejudice to a hearing of this cause as asked for in said motion.

4. Thereupon said demurrer of said defendant was refiled and came on for hearing and the court, after being advised in the premises, overruled said demurrer. And thereupon came on for hearing this cause upon the motion of the complainant for a decree herein.

5. And it further appearing to the court that said defendant had failed to make any answer to the bills of complaint filed herein, but had filed its demurrer thereto, which demurrer had been overruled, the said bill stand as confessed and is now taken as true.

6. Now Therefore it is by the court considered, ordered and adjudged that the Clerk enter an order in the order book that the com-

plainant's bills filed herein be taken *pro confesso* as a matter of course.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719 Frederick Zimmerman etc. Plaintiff *vs.* K. C. N. W. R. R. Co. Defendant. Order *Pro Confesso*.. Filed Oct. 27, 1906 Geo. F. Sharitt, clerk

71 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of Leonard Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Decree.

1. On this 27th day of November 1906 this cause came on to be heard and it appearing to the court that on the 27th day of October, 1906, it was ordered that a decree *pro confesso* be taken herein and it further appearing to the court that thirty days has elapsed since said order and it further appearing to the court that the defendant has not filed any pleading herein and is still in default.

2. Now therefore the bill and the amended bills of complaint filed herein stands as confessed and are taken as true and the court finds that said Frederick Zimmerman was, at the commencement of this suit and still is, the duly appointed, qualified and acting administrator of the estate of Leonard Zimmerman, deceased, and that said Kansas City Northwestern Railroad Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Kansas and is the successor in interest of The Kansas City Wyandotte and Northwestern Railroad Company, also a corporation duly organized and existing under and by virtue of the laws of the State of Kansas.

3. The Court further finds that in the year 1899 and many years previous thereto and at all the times herein mentioned Leonard Zimmerman now deceased, was the owner of fractional Lot 7 in Block 7 and Lots 6 and 7 in Block 8, all in Fackler's Addition to the City of Leavenworth, Leavenworth county, Kansas. That Second
72 street was a duly laid-out and established graded street in said City of Leavenworth, running north and south and running between Block 7 lying on the east side, and Block 8, lying on the west side, of said Second street.

4. The court further finds that about May A. D. 1897 the said Kansas City Wyandotte and Northwestern Railroad Company constructed and built a railroad in a northeasterly direction through the City of Leavenworth until it came to a point on the south line of fractional Lot 7 of said Zimmerman's property and then, without any right or authority from him and without condemning the same, it

appropriated a part and portion of said fractional Lot 7 and constructed its road in the same direction between said blocks across and over said part and portion of said Second Street immediately in front of said Zimmerman's property and raised and made a high embankment of a permanent nature the whole width of said Second street and placed iron rails thereon and thereby changed and raised the established grade of said Second Street, as long prior thereto established by the City of Leavenworth, to a heighth of three feet immediately in front of the above described property and operated engines, cars and trains daily thereon and seriously and permanently impaired the egress and ingress to and from said property.

5. The court further finds that on the 2nd day of February, 1889 Leonard Zimmerman, deceased, began his action against said Kansas City Wyandotte and Northwestern Railroad Company in the District Court of Leavenworth county, Kansas to recover damages for the aforesaid wrongs and that on the 15th day of May, 1897, he recovered, in the above entitled court and cause, judgment against said Kansas City Wyandotte and Northwestern Railroad Company, for the sum of $3000.00 with interest thereon from said date at the rate of six per cent. per annum until paid and his costs therein expended, for damages sustained by reason of the appropriation of his land and the construction of the railroad as aforesaid, which judgment is now in full force and effect.

6. The court further finds that Leonard Zimmerman died on the 9th day of July, 1897, and thereafter and on the 7th day of May,
1898, said cause and judgment were duly revived in the name
73 of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased, and he was duly authorized to recover of and from said The Kansas City Wyandotte and Northwestern Railroad Company, said sum of $3000.00 with interest thereon at the rate of six per cent. per annum from the 15th day of May, 1897, and all costs therein expended.

7. And the court further finds that about January 2nd, 1888 said Kansas City Wyandotte and Northwestern Railroad Company executed and delivered to The Farmers Loan and Trust Company of New York a deed of trust or mortgage on its said railroad right-of-way, tracks, equipment, and franchise, which mortgage purported to cover the right-of-way appropriated as aforesaid.

8. The court further finds that on or about the 31st day of March, 1890, said Farmers Loan and Trust Company of New York commenced its suit in the Circuit court of the United States for the District of Kansas to foreclose said deed of trust or mortgage and on or about the 18th day of January, 1893 a decree was entered against said Kansas City Wyandotte and Northwestern Railroad Company foreclosing said deed of trust or mortgage and ordering that said property be sold.

9. The court further finds that on or about the — day of —— 1894, said property was sold to George C. Smith and B. P. Waggener, who were the agents and purchasing trustees for said defendant herein.

10. The court further finds that thereafter said George C. Smith

and B. P. Waggener, as such trustees, conveyed to the defendant herein, The Kansas City Northwestern Railroad Company, all of the property, rights and franchises purchased by and conveyed to them under said foreclosure proceedings and that such defendant took possession of all of said property, rights and franchises and also the premises in controversy, and has ever since the — day of ——, 1894, had possession thereof and daily operated its engines, trains and cars over and across said premises.

11. The court further finds that said B. P. Waggener one of the purchasing trustees at such foreclosure sale, was the general attorney for said Kansas Wyandotte and Northwestern Railroad Company and was one of the attorneys of record in said suit of Leonard Zimmerman against said last mentioned company and had actual knowledge of the pendency of said action in the District Court of Leavenworth county, Kansas and the nature and extent thereof and
74 what was claimed by said plaintiff in his said action and well knew that said plaintiff had not been compensated for his land appropriated and the damage sustained by him and that said defendant had actual knowledge of said complainant's claims mentioned herein.

12. The court further finds that after the recovery of said judgment by said Leonard Zimmerman and on the 21st day of May, 1899 said complainant commenced his action in the District court of Leavenworth county Kansas against said defendant to recover from it said sum of $3000.00 with interest thereon from the 15th day of May, 1897, and costs, the amount of the judgment recovered against The Kansas City Wyandotte and Northwestern Railroad Company as aforesaid; that said case was duly removed to this court and docketed on the equity side thereof and complainant recast his bill in conformity with the equity rules and thereafter, by leave of court, filed his amended bill herein on the 9th day of May, 1901 as heretofore stated.

13. Now Therefore it is by the court considered, ordered and adjudged that said complainant, Frederick Zimmerman, administrator of the estate of Leonard Zimmerman, deceased, have and recover of and from the said defendant, The Kansas City Northwestern Railroad Company $3000.00 with interest thereon from the 15th day of May, 1897, at the rate of six per cent. per annum until paid and the costs of said suit as prayed for in his said amended bill of complaint.

13½. The court further finds that one of the conditions in the said foreclosure decree was as follows:

"This court hereby reserves to itself from this decree the power and jurisdiction both as against the parties to this suit and as against said purchaser as said contemplated sale to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplem-ntary decrees touching said claims and demands as may be deemed proper."

And that a condition of the order of confirmation of said
75 foreclosure sale was as follows:

"And said master commissioner is ordered and directed to make to the purchasers at said sale, to-wit, George C. Smith and B. P. Waggener purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report, to said purchasers, said report being confirmed, however, subject to the provisions of said original decree and subject to the provisions to be contained in the deed executed by said Master Commissioner to said purchaser."

And that the following order was endorsed on the purchasers' deed:

"The foregoing deed examined and approved subject to the condition that the purchaser take the property subject to all the orders of the court relating to the payment of the debts of the company, and the receiver, and said property shall remain liable for such debts if any there are remaining unpaid.

HENRY C. CALDWELL,
U. S. Circuit Judge."

14. It is further considered, ordered and adjudged that said complainant is entitled to and shall have and recover all his costs herein expended.

15. It is further considered, ordered and adjudged by this court, that if said defendant fails to pay said sum of money with the interest thereon as aforesaid within ninety days from this date then and in that case this court reserves the right to enforce the same by the processes of this court on execution or it may appoint a receiver or receivers to take possession of said defendant's railroad and equipment and operate the same and collect the revenues derived from such operation and apply them to the payment of said complainant's claim and costs, until said sum of $3000.00 with interest as aforesaid shall be paid and the costs herein ordered to be paid and to make all such other and further orders, at the foot of this decree as may be deemed meet and proper to enforce the rights of the complainant herein as against said defendant.

16. Upon the application of the defendant and for good cause shown an appeal is allowed herein.

JOHN C. POLLOCK, *Judge.*

76 Endorsed: No. 7719. Zimmerman *v.* K. C. N. W. R. R. Co. Decree. Filed Nov. 27, 1906. Geo. F. Sharitt, clerk.

77 In the Circuit Court of the United States for the District of Kansas, First Division.

No. —.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Assignment of Errors.

Comes now the defendant and files the following assignment of errors, upon which it will rely in the prosecution of its appeal in the above entitled cause.

1.

That the Circuit Court of the United States, for the District of Kansas, First Division, erred in overruling the demurrer interposed by the defendant to the bill of complaint filed in this cause and by holding and deciding under the matters and things stated in said bill it had jurisdiction of said cause, and jurisdiction to grant the relief prayed for in said bill.

2.

That the Circuit Court of the United States, for the District of Kansas, First Division, erred in rendering final decree against defendant on the bill filed herein and rendering judgment against defendant for costs.

3.

Wherefore, in order that the foregoing assignment of errors may be and appear of record the defendant presents the case to the court and prays that some disposition be made thereof in accordance with the law and statutes of the United States in such cases, and complainant prays a reversal of the decretal order and decree of final
78 judgment made and entered by said court.

B. P. WAGGENER,
Solicitor for Complainant.

Endorsed: No. 7719 Frederick Zimmerman *v.* The Kansas City Northwestern R. R. Co. Assignment of Errors. Filed Jan'y 17, 1907 Geo. F. Sharitt, clerk.

79 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Petition for Allowance of Appeal.

The above named defendant considers itself aggrieved by the orders and decrees made and entered in the above entitled cause on the 27th day of November A. D. 1906, and on previous days, for the reasons specifically set out in the assignment of errors filed herein, and doth hereby appeal from said orders and decrees to the Supreme court of the United States, and prays that this appeal be allowed and that a transcript of the records appearance and proceedings, upon which said orders and decrees were made, duly authenticated, may be sent to the Supreme Court of the United States.

B. P. WAGGENER,
Solicitor for Complainant.

Endorsed: No. 7719 Frederick Zimmerman admr. &c. *vs.* The Kansas City Northwestern R. R. Co. Petition for allowance of appeal. Filed Jan'y 17, 1907 Geo. F. Sharitt, clerk.

80 In the Circuit Court of the United States for the District of Kansas, First Division.

No. —.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Order Allowing Appeal.

On, to-wit, the 17th day of January A. D. 1907, the Honorable John C. Pollock, Judge of the District Court of the United States, for the District of Kansas, First Division, at Chambers, in the Federal Building at the City of Topeka, Shawnee County, Kansas; on a motion of the solicitors and counsel for complainant, it is ordered that an appeal to the Supreme Court of the United States, from the final decree heretofore filed and entered herein, be and the same is hereby allowed. And that a certified transcript of the records, exhibits, and all proceedings herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that bond on appeal and for supersedeas be

fixed at the sum of Five thousand dollars. Said bond also to cover costs and damages on appeal.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719. Frederick Zimmerman *vs.* The Kansas City Northwestern R. R. Co. Order allowing appeal. Filed Jan'y 17, 1907 Geo. F. Sharitt, clerk

81 In the Circuit Court of the United States, for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant.

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Bond.

Know all men by these presents, That we, The Kansas City Northwestern Railroad Company, defendant above named, as principal, and B. P. Waggener, as surety are held and firmly bound unto Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased, complainant above named, in the full sum of Five Thousand and no/100 dollars to be paid to said complainant, his attorneys, solicitors, executors, administrators and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals, and dated this 16 day of January, 1907.

Whereas, lately at a session of the Circuit Court of the United States for the District of Kansas, first Division, in a suit then pending in equity in said court between the aforenamed Frederick Zimmerman, as administrator of the estate of L. Zimmerman, deceased, complainant, and the Kansas City Northwestern Railroad Company, defendant, a final decree was rendered against said defendant, and said defendant having obtained from said court an allowance of appeal in said cause to reverse said decree, and a citation directed to said defendant is about to be issued citing and admonishing said defendant to be and appear at the next regular term of the Supreme court of the United States, to be held at the court room of said court at the City of Washington, District of Columbia;

82 Now therefore, the condition of this bond is such that if the said Kansas City Northwestern Railroad Company shall prosecute its appeal to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

THE KANSAS CITY NORTHWESTERN RLY. CO.,
By B. P. WAGGENER, *Gen. Att'y.*
B. P. WAGGENER.

Sufficing of sureties on the foregoing bond approved this 17th day of January, 1907

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719 Frederick Zimmerman admr. &c. *vs.* The Kansas City Northwestern R. R. Co. Bond on appeal. Filed Jan'y 17, 1907 Geo. F. Sharitt, clerk.

83 UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings in said court in Case No. 7719 wherein Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased, is complainant and The Kansas City Northwestern Railroad Company is the defendant.

I further certify that the Original Citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 24th day of January A. D. 1907.

[The Seal of the Circuit Court of the United States. 1862. District of Kansas.]

GEO. F. SHARITT, *Clerk.*

84 In the Supreme Court of the United States, October Term, 1906.

No. 609.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Appellant,

vs.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Appellee.

Stipulation.

It is hereby stipulated by and between the parties hereto that the attached parts of the transcript of the record in the Circuit Court of the United States for the District of Kansas, First Division, being those parts of the record in the above entitled action in the lower court which are not attached to the record herein may be attached to and made part of the record in this court in pursuance of and in conformity with the motion of the Appellee filed herein and which was sustained by this court, and that certiorari need not issue herein.

Witness our hands this 25th day of May, A. D. 1907.

B. P. WAGGENER,
Solicitors for Appellant.
JOHN H. ATWOOD,
Solicitors for Appellee.

85 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased,
v.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY.

Order.

And on this 6th day of January, 1905, comes on for hearing the motion of the defendant to dismiss the second amended bill of complaint filed on the 30th day of April, 1904. The court, having re-examined the case and fully considered the briefs and argument of counsel, sustains the motion of the defendant and dismisses the second amended bill of complaint herein filed upon the ground and for the reason stated in the memoranda of opinion herein filed on the 23d day of April, 1904.

JOHN C. POLLOCK, *Judge.*

Endorsed: 7719 Zimmerman *v.* K. C. N. W. Ry. Co. Order, dismissing second amended bill. Filed Jan'y 6, 1905 Geo. F. Sharitt, clerk.

86 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Petition for Appeal.

Now comes Frederick Zimmerman, Administrator of the estate of L. Zimmerman, deceased, complainant above named, and says that on or about the 6th day of January, 1905, this court entered judgment herein, in favor of The Kansas City Northwestern Railroad Company, the defendant and against the complainant herein, dismissing the complainant's second amended bill of complaint filed herein, in which order, judgment and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this complainant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, this complainant prays that an appeal may be allowed in this behalf to the United States Circuit Court of Appeals for the

Eighth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

ATWOOD AND HOOPER,
Solicitors for Complainant.

87 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Assignment of Errors.

The complainant in this action in connection with his petition for an appeal makes the following assignment of errors, which he avers occurred upon the hearing of this cause, to-wit:—

First. That the court erred in not sustaining complainant's motion to remand said cause to the District Court of Leavenworth county, Kansas from whence it had come on removal at the instance of the defendant herein.

Second. That the court erred in sustaining the defendant's demurrer to the first amended bill of complaint filed herein.

Third. That the court erred in sustaining the motion of the defendant herein to dismiss the second amended bill of complaint filed herein on the 30th day of April, 1904.

Fourth. That the court erred in holding that the bill of complaint filed herein against the said defendant failed to state facts sufficient to constitute a cause of action against the said defendant, and that the complainant was not entitled to any relief therefrom.

Fifth. That the court erred in holding that the complainant could not obtain any relief, except by petition in intervention in the suit of The Farmer's Loan and Trust Company *vs.* The Kansas City Northwestern Railroad Company, heretofore pending in this court.

Sixth. That the court erred in holding that the said bill of complaint filed herein did not state any equities, which entitled
88 the complainant to the relief as prayed for in his amended bill of complaint filed herein.

Seventh. That the court erred in dismissing the second amended bill of complaint filed herein on the 30th day of April, 1904.

ATWOOD AND HOOPER,
Solicitors for Complainant.

Endorsed: No. 7719. Frederick Zimmerman, Plaintiff *vs.* The K. C. N. W. Railroad Co. Defendant. Petition and Assignment of Errors. Filed Jan'y 9, 1905. Geo. F. Sharitt, clerk.

89 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 7719. Equity.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

On this day came the complainant herein and files his petition for an appeal and his assignment of errors herein; and the court, upon due consideration, allows said appeal as prayed for by said complainant to the United States Circuit Court of Appeals for the Eighth Circuit, and the bond to be given by said complainant on said appeal is hereby fixed at three hundred ($300.00) dollars, the same to be conditioned as prescribed by law, the same to be approved by the Clerk of this court. Dated January 19th, 1905.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719 Frederick Zimmerman *vs.* The K. C. N. W. R. R. Co. Order Filed Jan'y 9, 1905 Geo. F. Sharitt, clerk.

90 In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Bond.

Know all men by these presents that we, Frederick Zimmerman, administrator as aforesaid, as principal, and Lee Bond, as surety, are jointly and severally held and firmly bound unto the above named, The Kansas City Northwestern Railroad Company, in the sum of Three Hundred dollars, lawful money of the United States of America, to be paid to the said The Kansas City Northwestern Railroad Company, for which payment well and truly to be made, we bind ourselves, and each of us, our heirs executors administrators and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of January, in the year of our Lord, One Thousand Nine Hundred and Five.

The conditions of the above obligation are such that

Whereas, at a late term of the circuit Court of the United States for the District of Kansas, First Division, and on or about the 6th day of January, 1905 the defendant secured a judgment dismissing plaintiff's bill of complaint and an order of judgment was rendered

against said plaintiff dismissing his said bill and rendering judgment thereon for costs against him; and the said complainant having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the order and judgment rendered in the aforesaid suit and a citation directed to said Kansas City Northwestern Railroad Company is about to issue citing and admonishing it to be at the
91 United States Circuit Court of Appeals for the Eighth Circuit to be hold*ing* at St. Louis in the State of Missouri.

Now the condition of the above obligation is such that if the said complainant shall prosecute his appeal to effect and shall answer all the damages and costs that may be awarded against him if he fail to make his plea — then the above obligation is to be void, otherwise to remain in full force and effect.

FREDERICK ZIMMERMAN, *Adm'r.*
LEE BOND.

Approved:
JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719 Frederick Zimmerman, admr. etc. Plaintiff *vs.* The Kansas City Northwestern R. R. Co. Defendant. Bond. Filed Jan'y 26, 1905 Geo. F. Sharitt, clerk

92 UNITED STATES OF AMERICA, *District of Kansas, ss:*

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the City of Topeka, in said District on Monday the 27th day of November, 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

MONDAY, *May* 21, 1906.

7719.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Now comes the defendant herein by Atwood & Hooper, its attorneys and on their motion it is ordered by the court, that the mandate from the United States Circuit Court of Appeals filed May 5, 1906 be spread upon the records of this court.

Mandate.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Kansas, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the District of Kansas, before you, or some of you in a cause between Frederick Zimmerman administrator of the estate of L. Zimmerman, deceased, complainant and The Kansas City Northwestern Railroad Company, defendant, wherein the decree of the said Circuit Court in said cause, entered on the 6th day of January A. D. 1905 is in the following words viz:

"And on this 6th day of January, 1905, comes on for hearing the motion of the defendant to dismiss the second amended bill of complaint filed on the 30th day of April, 1904. The court, having re-examined the case and fully considered the briefs and argument of counsel, sustains the motion of the defendant and dismisses the second amended bill of complaint herein filed upon the ground and for the reason stated in the memoranda of opinion herein filed
93 on the 23d day of April, 1904

JOHN C. POLLOCK, *Judge.*"

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit by virtue of an appeal agreeably to the act of Congress, in such case made and provided fully and at large appears,

And whereas, in the present term of December, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of record from said Circuit Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby reversed with costs; and that Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, have and recover against The Kansas City Northwestern Railroad Company the sum of Ninety Five and 15/100# Dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to proceed in harmony with the views expressed in the opinion of this court.

MARCH 3, 1906.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice,

and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Third day of May in the year of our Lord one thousand nine hundred and six.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of Appellant.

Clerk	$25.65
Printing Record	49.50
Attorney	20.00
	$95.15

94 UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of Order, dismissing Second Amended Bill, Petition for an Appeal, and Assignment of Errors, Order allowing Appeal, Bond on Appeal, and Order directing that Mandate of United States Circuit Court of Appeals be spread of record and Mandate in the suit of Frederick Zimmerman, administrator etc. *vs.* The Kansas City Northwestern Railroad Company, Case No. 7719 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 21st day of May A. D. 1907.

[The Seal of the Circuit Court of the United States. 1862. District of Kansas.]

GEO. F. SHARITT, *Clerk.*

95 [Endorsed:] File No. 20574 Supreme Court U. S. October Term, 1907. Term No. 231. The Kansas City Northwestern R. R. Co., App't, *vs.* Fred'k Zimmerman, as adm'r, &c. Stipulation for addition to record. Filed June 5, 1907.

[Endorsed:] 231, 20574, June 5, '07.

Endorsed on cover: File No. 20,574. Kansas, C. C. U. S. Term No. 231. The Kansas City Northwestern Railroad Company, appellant, *vs.* Frederick Zimmerman, as administrator of L. Zimmerman, deceased. Filed February 16, 1907. File No. 20,574.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1907.

No. 231.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Appellant,
vs.
FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Appellee.

STIPULATION.

It is hereby stipulated by and between the parties hereto that Appellant may have printed and attached to the record on file in the Supreme Court of the United States any part of the record in the Circuit Court of the United States which may have been omitted from such record, and may have permission to file supplemental record and transcript.

B. P. WAGGENER,
Solicitors for Appellant.
JOHN H. ATWOOD AND
W. W. HOOPER,
Solicitor- for Appellee.

Oct. 26, 1907.

In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, as Administrator of the Estate of L. Zimmerman, Deceased, Complainant,
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Certificate of Court as to Issue Involved.

This is to certify that the question involving the jurisdiction of the Circuit Court in the above entitled action was in issue herein, and was decided against the defendant, and in favor of the complainant; and the question whether this court acquired jurisdiction by the removal from the state court, and had jurisdiction to grant to the complainant the relief prayed for, is hereby certified to the Supreme Court of the United States for decision.

Witness my hand this 23rd day of October, 1907.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 7719. Zimmerman, adm'r, *vs.* K. C. N. W. R. R. Co. Certificate as to issue involved. Filed Oct. 25, 1907. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of Certificate as to issue involved in the suit of Frederick Zimmerman, as Administrator &c. *vs.* The Kansas City Northwestern Railroad Company, Case No. 7719 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 25th day of October A. D. 1907.

[Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT, *Clerk.*

[Endorsed:] File No. 20,574. Supreme Court U. S., October Term, 1907. Term No. 231. The Kansas City Northwestern R. R. Co., app't, *vs.* Frederick Zimmerman, adm'r, &c. Stipulation of counsel and addition to record. Filed Nov. 2d, 1907.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 231.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, APPELLANT,

vs.

FREDERICK ZIMMERMAN, ADMINISTRATOR OF THE ESTATE OF L. ZIMMERMAN, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

SUGGESTION OF DIMINUTION OF RECORD AND MOTION FOR CERTIORARI.

JOHN H. ATWOOD,
W. W. HOOPER,
Solicitors for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20204

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 609.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, APPELLANT,

vs.

FREDERICK ZIMMERMAN, ADMINISTRATOR OF THE ESTATE OF L. ZIMMERMAN, DECEASED, APPELLEE.

NOTICE.

To the above-named appellant and B. P. WAGGENER, its attorney of record:

You are hereby notified that the appellee, Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, has filed his motion in the above-entitled court and cause suggesting a diminution of the record, a copy of which motion is hereto attached and made a part hereof.

You are hereby further notified that on Monday, April 1, 1907, said motion will be called up for hearing at the convening of said court or so soon thereafter as the same can be heard, at which time you may be present if you so choose.

ATWOOD & HOOPER,
Solicitors for Appellee.

Service of above notice acknowledged March 18, 1907.

W. P. WAGGENER,
B. P. WAGGENER,
Attorneys for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1886.

No. 609.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY,
Appellant,
vs.
FREDERICK ZIMMERMAN, *Administrator of the Estate of L. Zimmerman, Deceased, Appellee.*

MOTION OF APPELLEE TO CORRECT RECORD.

Now comes Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, and represents and shows unto this honorable court that this controversy has been heretofore taken on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and that there the question of jurisdiction as well as all questions upon the merits of said cause were submitted for determination by the parties to said court of appeals, and that said court of appeals in passing upon said cause passed upon the question of jurisdiction, as well as all questions upon the merits of said cause, and that said cause, after being duly submitted by the appellant and appellee to said court of appeals for determination, it was by said court of appeals duly determined adverse to the said appellant, and there was entered in said matter a judgment directing that the said Circuit Court of the United States for the District of Kansas, First Division, from which court this appeal has been taken, should enter the judgment herein appealed from, and a mandate was issued from said court of appeals to said circuit court to this effect, all of which fully appears from the records of said circuit court in this cause.

Therefore this appellee alleges that a complete transcript of the record of said circuit court has not been made or filed

herein by the appellant, and that a part of the same which is essential to a proper determination of this cause in this court has been omitted from the record herein, and the appellee, for said reasons, moves this court to require the appellant, or that it make an order, that a true transcript of the proceedings had and done in this cause in the said circuit court and in the said court of appeals be brought up from said circuit court and attached to the part of the record which has been brought here by the appellant, and that this court make all such further and necessary orders in the premises as shall be deemed meet and proper to present to this court a true transcript of the proceedings showing a true record of what was had and been done in said circuit court in said cause, as well as a true record of the proceedings of that which was had and been done in this cause in the Circuit Court of Appeals for the Eighth Circuit, as above mentioned.

And this your appellee will ever pray.

ATWOOD AND HOOPER,
Solicitors for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1906.

No. 609.

THE KANSAS CITY NORTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

FREDERICK ZIMMERMAN, *Administrator of the Estate of L. Zimmerman, Deceased, Appellee.*

AFFIDAVIT IN RE DIMINUTION OF RECORD.

STATE OF KANSAS,
Leavenworth County, ss:

W. W. Hooper, of lawful age, being first duly sworn, on oath, according to law, states that he is one of the solicitors for the appellee herein, and that he makes this affidavit for the reason that he is cognizant of the facts herein stated.

Affiant further states that said appellee commenced his suit in the District Court of Leavenworth County, Kansas, against the above-named appellant to recover the sum of $3,000.00 claimed to be due from said appellant to said appellee on account of damages sustained by him; that, on petition of the appellant, said suit was removed from said court to the Circuit Court of the United States for the District of Kansas, First Division, and that it being so removed and a transcript of the record being filed in said Circuit Court of the United States for the District of Kansas, First Division, appellee filed his demurrer to said bill, and as one of the grounds thereof alleged that the circuit court had no jurisdiction.

Affiant further states that said demurrer was by said court sustained; whereupon said appellee appealed said case to the

Circuit Court of Appeals of the United States for the Eighth Circuit, in which court all questions sought to be raised herein were submitted to said circuit court of appeals for determination; all of which will more fully appear from the opinion of said court in said cause, found in *144 Federal Reporter, at page 622*, being entitled Zimmerman *vs.* The Kansas City Northwestern R. R. Co., which opinion is referred to and made a part of this affidavit.

Affiant further states that thereafter and on the 3d day of May, 1896, a mandate from said circuit court of appeals was issued to the Circuit Court of the United States for the District of Kansas, First Division, and was received and filed in said court on the 5th day of May of said year; that thereafter, at a term of the Circuit Court of the United States for the District of Kansas, First Division, and on Monday, May 21, 1906, the mandate of said court was ordered spread upon the record in said cause; all of which will more fully appear from a certified copy of the record thereof hereto attached, made part hereof, and marked "Exhibit No. 1."

Affiant further states that after said mandate was entered of record, as aforesaid, said United States Circuit Court for the District of Kansas, First Division, rendered a judgment therein setting aside its former order sustaining the demurrer of the appellant, and thereupon said circuit court, upon the application of the appellant, granted leave to said appellant to plead or answer to the amended bill filed herein within sixty days from said date.

Affiant further states that said appellant failed to plead to the bill of complaint filed herein or to make any answer thereto, and after the expiration of sixty days stood in default; whereupon this affiant, for and on behalf of the appellee, filed his motion asking the court to enter an order taking its last amended bill filed herein *pro confesso;* which application was by the court granted.

Affiant further states that after the expiration of thirty days from the taking of said amended bill *pro confesso* the

appellee, through its solicitors aforesaid, made application for a final decree in said cause and notified said appellant that it would, on a certain day in its written notice named, ask said Circuit Court of the United States for the District of Kansas, First Division, for a final decree in said cause, and that on said day and in said cause the appellant appeared by Frank Doster, its solicitor, and the appellee by this affiant, its solicitor, and said appellant made application to said court to refile its demurrer heretofore filed in said cause, and which demurrer had been directed to be overruled by said Circuit Court of Appeals for the Eighth Circuit; that, over the objections of said appellee, the said Circuit Court of the United States for the District of Kansas, First Division, granted said application, however, to be without prejudice to a hearing at that time.

Affiant further states that after the refiling of said demurrer and on said day said demurrer came on again to be heard and was by said Circuit Court of the United States for the District of Kansas, First Division, overruled; and thereupon said appellant refused to further plead or answer, but was in default; and thereupon the court entered the decree appealed from herein by said appellant.

Affiant further states that the records of the Circuit Court of the United States for the District of Kansas, First Division, show the proceedings had and done as herein stated, and that the record filed herein by the appellant fails to show any other proceedings had as herein stated, and therefore said record in this cause should be amended so as to show such facts, so that this court can make a proper determination thereof and as prayed for in the motion filed by the appellee herein.

And further affiant saith not.

W. W. Hooper.

Subscribed and sworn to before me this 12th day of April, A. D. 1907.

[seal.] John H. Atwood, Jr.,
Notary Public.

My commission expires December 26, 1908.

UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the Circuit Court of the United States of America for the District of Kansas began and held at the city of Topeka, in said district of Kansas, on Monday, the 27th day of November, A. D. 1905, proceedings were had and appear of record in words and figures as follows, to wit:

MONDAY, *May* 21, 1906.

7719.

FREDERICK ZIMMERMAN, *Administrator of the Estate of L. Zimmerman, Deceased, Complainant,*
vs.
THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, *Defendant.*

Now comes the defendant herein, by Atwood & Hooper, its attorneys, and on their motion it is ordered by the court that the mandate from the United States Circuit Court of Appeals, filed May 5 1906, be spread upon the records of this court.

MANDATE.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Kansas, Greeting:

Whereas lately in the Circuit Court of the United States for the District of Kansas, before you or some of you, in a cause between Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, complainant

and The Kansas City Northwestern Railroad Company, defendant, wherein the decree of the said circuit court in said cause, entered on the 6th day of January, A. D. 1905, is in the following words, viz:

"And on this 6th day of January, 1905, comes on for hearing the motion of the defendant to dismiss the second amended bill of complaint filed on the 30th day of April, 1904. The court, having re-examined the case and fully considered the briefs and argument of counsel, sustains the motion of the defendant and dismisses the second amended bill of complaint herein filed, upon the ground and for the reason stated in the memoranda of opinion herein filed on the 23d day of April, 1904.

"JOHN C. POLLOCK, *Judge.*"

as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of December, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said United States Circuit Court of Appeals on the transcript of record from said circuit court and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs; and that Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, have and recover against the Kansas City Northwestern Railroad Company the sum of ninety-five and 15/100 dollars for his costs in this behalf expended, and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to proceed in harmony with the views expressed in the opinion of this court.

MARCH 3, 1906.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the third day of May, in the year of our Lord one thousand nine hundred and six.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of Appellant.

Clerk	$25.65
Printing record	49.50
Attorney	20.00
	$95.15

(Endorsed:) #7719. United States Circuit Court of Appeals, December term, 1905. No. 2228. Frederick Zimmerman, adm'r, &c., appellant, *vs.* Kansas City Northwestern Railroad Company. Mandate. Filed May 5, 1906. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of an order of said court from the record of the proceedings thereof in the suit of Frederick Zimmerman, administrator of the estate of L. Zimmerman, deceased, *vs.* The Kansas

City Northwestern Railroad Company, case No. 7719 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, in said district of Kansas, this 30th day of March, A. D. 1907.

[SEAL.] G. F. SHARITT, *Clerk.*

(20,574.)

Supreme Court of the United States.

OCTOBER TERM, 1907

The Kansas City Northwestern Railroad Company, Appellant. VS. Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased; E. A. Kelly, Administrator *de bonus non* of the estate of L. Zimmerman, substituted for Frederick Zimmerman, Administrator Appellee.	No. 231

BRIEF OF APPELLEE.

MOTION TO DISMISS.

(TITLE OMITTED.)

Now comes E. A. Kelly, administrator *de bonus non* of the estate of L. Zimmerman, deceased, and moves the court to dismiss this appeal for the reason that all the matters and things sought to be reviewed in this court have been reviewed by the United States Circuit Court

of Appeals for the Eighth Circuit and decided adverse to said appellant company (146 Federal Reporter, page 622) and said judgment has become final, said appellant company never having taken any steps to have the judgment of the United States Circuit Court of Appeals for the Eighth Circuit reviewed in this court and the time in which such review can be had has lapsed.

JOHN H. ATWOOD,
Solicitor for Appellee.

WILLIAM W. HOOPER,
of Counsel.

STATEMENT OF FACTS.

On the 15th day of May, 1897, L. Zimmerman recovered a judgment against The Kansas City, Wyandotte and Northwestern Railroad Company for the sum of $3000.00, with interest thereon from May 15th, 1897, until paid, at the rate of six per cent. per annum and costs of suit, on account of damages sustained by him by reason of said company appropriating a right-of-way over his land and making an embankment some three feet high above the established street grade in front of his premises, thereby destroying ingress and egress thereto and therefrom. (Record 53, Paragraph 4.)

L. Zimmerman afterwards died and Frederick Zimmerman, his son, was duly appointed administrator of his estate.

The Kansas City, Wyandotte and Northwestern Railroad Company, some time in the year 1888 and at about the time the right-of-way was appropriated, as aforesaid, gave a mortgage to The Farmers Loan and Trust Company of New York on all its property, rights and franchises, and in 1894 this mortgage was foreclosed in the Circuit Court of the United States for the District of Kansas, First Division and all the property described in said mortgage was sold under the directions of said court and was bought by a purchasing committee, who afterwards conveyed to the appellant herein; said appellant, through its officers and agents, at all times having due notice of the action of said L. Zimmerman to recover damages, as above stated, as this action was brought in March, 1889.

After L. Zimmerman recovered his judgment, as aforesaid, and said Frederick Zimmerman was appointed administrator, as above stated, he, as administrator, brought suit in the District Court of Leavenworth County, Kansas, against the appellant herein asking that it be required to pay said judgment or that it be enjoined from using said land, appropriated as aforesaid.

In the petition said Zimmerman made the following allegation:

> "Plaintiff further avers that during this time and about January 2nd, 1888, The Kansas City, Wyandotte and Northwestern Railroad Company mortgaged

said road, franchises and equipment to The Farmers Loan and Trust Company of New York and that on or about March 21st, 1890, said Trust Company began its action in the Circuit Court of the United States for the District of Kansas, First Division, to foreclose its said mortgage and that on or about the 18th dav of June, 1891, a decree was entered against said Kansas City, Wyandotte and Northwestern Railroad Company foreclosing said mortgage and ordering said property to be sold unless within some short time thereafter in said decree mentioned said Railroad Company, or some person or persons for it, should pay the amount of said mortgage indebtedness with the expenses and costs thereof and that on or about the ——day of———, 189— said Railroad Company and all its equipment, appurtenances, etc. were ordered to be sold and were, on or about the——day of———, 1890, duly sold to the appellant, The Kansas City Northwestern Railroad Company, and that said defendant became the successor in interest of all rights and privileges of The Kansas City, Wyandotte and Northwestern Railroad Company, and as part of the consideration assumed and was subject to all the liabilities * * of the Kansas City, Wyandotte and Northwestern Railroad Company, under and by

virtue of said decree and purchase." (R. 4) (R. 2 to 6)

In due course of time the appellant, The Kansas City Northwestern Railroad Company, filed its petition and bond in said District Court, asking that said cause be removed to the Circuit Court of the United States for the District of Kansas, First Division, alleging in its petition for removal that a Federal question was involved, to-wit: the construction of a Federal decree; and in due time a transcript of the record was filed in the Circuit Court of the United States for the District of Kansas, First Division. (R. 12 to 15)

After the case was removed to the Federal Court and a transcript of the record filed, said administrator obtained leave of court to recast his pleading to conform to the equity practice of said court, which was done. (R. 17 to 23)

Afterwards he filed an amended bill of complaint and the appellant company filed its demurrer and amended demurrer thereto, the grounds, or one of the grounds of said demurrer being that the Circuit Court of the United States for the District of Kansas, First Division had no jurisdiction of this cause and that if the plaintiff was entitled to any relief he should file his petition in intervention in the Farmers Loan and Trust Company foreclosure suit for the reason that in said suit the court had reserved jurisdiction over such

claims as the plaintiff asserted in this cause. (R. 44 to 46)

Said Zimmerman, as administrator, also filed his motion to remand said cause to the District Court of Leavenworth County, Kansas. (R. 46)

Thereafter said demurrers and motion came on for hearing and the motion to remand was overruled, and the demurrers so filed by said appellant company were sustained and the case dismissed. (See opinion and order R. 47–48)

Afterwards said Zimmerman filed his petition and assignments of error, asking for an appeal, which appeal was allowed and taken to the United States Circuit Court of Appeals for the Eighth Circuit. (R. 61 to 62)

A transcript of the record was duly filed in said United States Circuit Court of Appeals for the Eighth Circuit and said cause came on for hearing and the judgment sustaining said demurrers to said bills of complaint, filed as aforesaid, and dismissing said cause of action, was reversed; said Court of Appeals passed upon all questions involved and presented by said bill, not only the question of jurisdiction but also as to the merits presented by the facts, as alleged in said bill. (See Zimmerman, Administrator v. Kansas City Northwestern Railroad Co., 144 Federal Reporter, page 622; see also the mandate of the United States Circuit Court of Appeals for the Eighth Circuit reversing the Circuit Court of the United

States for the District of Kansas, First Division, R. 65.)

Under the rules and practice of said court, after the expiration of 60 days said appellant company, having taken no further action in the cause, having filed no application for *certiorari* or appeal to this court, a mandate was issued by said Court of Appeals, directing the lower court to reverse its decision and to proceed in accordance with the views of said Court of Appeals. (R. 65)

Afterwards proper proceedings were had which resulted in a decree in favor of said Zimmerman, as administrator, which adjudged and decreed that said appellant company should pay said Zimmerman's claim. (See R. 53 to 56)

The company appealed direct to this court from this decree on the ground that the Circuit Court had no jurisdicti *n*, seeking, in this way, to have this decree reversed.

Afterwards said Frederick Zimmerman, administrator as aforesaid, died and such proceedings were had as to duly revive said action and to substitute E. A. Kelly as administrator *de bonus non* in the place and stead of said Frederick Zimmerman, deceased.

I

ARGUMENT.

At the threshold of this case we submit that under the decision of this court the decree of the Circuit Court of the United States for the District of Kansas, First Division, should be affirmed

or this appeal dismissed, for the reason that the demurrers filed by appellant company to the amended bill rested, in part, upon the ground that said Circuit Court had no jurisdiction to hear this cause and if Zimmerman, the complainant therein, was entitled to any relief, it was his duty to file his petition in intervention in the suit of the Farmers Loan and Trust Company, in foreclosure, above mentioned; that said Circuit Court retained jurisdiction to determine Zimmerman's claim, if any he had; said Circuit Court sustained the Railroad Company's contention and rendered judgment accordingly; and Zimmerman, not being satisfied with the decision of said Circuit Court filed his appeal in said Court of Appeals; and the question of jurisdiction raised by the appellant as well as the merits of this cause,were submitted to said Circuit Court of Appeals; and all questions presented by the record, and especially the question of jurisdiction, was passed upon by said Court of Appeals. (Zimmerman, Administrator v. The Kansas City Northwestern Railroad Company, 144 Federal Reporter, page 622.) The decision is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

NO. 2228—DECEMBER TERM, A. D. 1905.

Frederick Zimmerman, Administrator of the Estate of L. Zimmerman, Deceased, Appellant, vs. The Kansas City, Northwestern Railroad Company, Appellee. } Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. John H. Atwood (Mr. William W. Hooper was with him on the brief) for appellant.

Mr. Frank Doster (Mr. B. P. Waggener, Mr. James W. Orr and Mr. W. P. Waggener were with him on the brief) for appellee.

Before SANBORN and ADAMS, Circuit Judges.

This was a bill in equity to enjoin the defendant company from operating its railroad over a lot of ground formerly owned by plaintiff's intestate, Zimmerman, until a judgment rendered against its predecessor in title, for damages sustained by the taking and appropriation of the lot should be paid.

By the Statutes of Kansas in force at the times hereinafter mentioned, (Sec. 1359 *et seq.*, Gen. Stats. 1901,) a scheme was provided by which railroad corporations in the exercise of the right of eminent domain might apply to a board of

commissioners to locate their roads make assessments of the value of the land taken and the damages occasioned thereby to the several owners, with provision for an appeal, so far as assessment of damages was concerned, to the District Court.

Without attempting to comply with the provisions of this statute, the Kansas City, Wyandotte & Northwestern Railway Company, hereinafter called Wyandotte Company, in 1887 entered as a trespasser upon and appropriated to its own use as a part of its right of way, a lot of ground in the City of Leavenworth belonging to plaintiff's intestate, and by disturbance of the established grade of the street, impaired ingress and egress to and from the lot.

In 1889 Zimmerman commenced an action against the Wyandotte Company in the District Court of Leavenworth County to recover damages sustained by the appropriation of his land and the construction of the railroad thereon. This resulted, in 1897, in a judgment in his favor for $3,000.00.

In 1888 the Wyandotte Company executed its mortgage conveying its railroad to a trustee to secure the payment of an issue of bonds Afterwards the trustee commenced an action in the Circuit Court

of the United States for the District of Kansas, and in 1896 secured a decree foreclosing the mortgage and ordering the property sold. It was subsequently sold to a purchasing committee who conveyed it to the defendant company. The decree, which by reference was made part of the bill, contained the following provision: "This court hereby reserves to itself from this decree, the power and jurisdiction both as against the parties to this suit and as against said purchaser at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company, before the commencement of this suit and to determine as to said claims whether they are or are not valid and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper," etc. The substance of this provision was also found in the purchasers' deed.

Defendant company, after the purchase, took possession of the lot as part of its right of way and has since then constantly retained and used the same. Neither the mortgagor company nor the purchasing company have ever paid

plaintiff's judgment or otherwise compensated Zimmerman for the damages sustained by him by reason of the taking and appropriation of his lot.

The trial court sustained a demurrer to this bill and after a final decree of dismissal it was brought here by appeal.

Adams, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Notwithstanding all the parties are citizens of Kansas, it is practically and we think necessarily conceded that the court below acquired jurisdiction, on the ground that the suit as originally brought involved a construction of the decree of the Federal Court in the foreclosure suit. We accordingly refrain from further considering the jurisdictional question raised by the assignment of error.

As the Wyandotte Company appropriated Zimmerman's lot without resorting to the statutory method of exercising the right of eminent domain or otherwise legally acquiring title or right to do so, it conferred upon Zimmerman the right to waive the trespass and commence his action in the District Court, the same as he might have done had formal proceed-

ings been taken by the railroad company and he had been dissatisfied with the award of the commissioners, "to recover compensation for all the damages which he sustained by reason of the permanent taking and appropriation of the right of of way by the railroad company." *C. B. U. P. R. R. Co.* v. *Andrews*, 26 Kan. 702, 710; *Cohen* v. *St. L., Ft. S. & W. R. R. Co.*, 34 Kan. 158; *Wichita & W. R. R. Co.* v. *Fechheimer;* 36 Kan. 45; *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645.

The bill discloses the true nature of Zimmerman's action as originally instituted in 1889. It was not an action of trespass *quare clausum fregit* to recover damages then accrued, but waiving the trespass committed by the railroad company and recognizing its action as the legal equivalent of formal proceedings of condemnation, Zimmerman sought by his suit exactly what he would have secured had such formal proceedings been taken and had he appealed from the award of the commissioners to the District Court to correct the same. His action was to secure such an award and the judgment, is in legal effect an award of all damages, past, present and future, which he sustained by reason of the appropriation of his lot.

The payment of this award was a con-

dition to the acquisition of title by the Wyandotte Company. Article 12, Sec. 4 of the constitution of Kansas ordains that "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or secured by a deposit of money to the owner * * *."

It is settled law that under constitutions of this character, which generally prevail in the United States, title does not pass from the owner of land appropriated to public use to the corporation making such appropriation until compensation has been actually made. *Kennedy* v. *Indianapolis*, 103 U. S. 599, 604; *Cherokee Nation* v. *S. Kansas Railway Co.*, 135 U. S. 641, 659; *Drury* v. *Midland Railroad*, 127 Mass. 571, 576; *Western Pa. R. R. Co.* v. *Johnston*, 59 Penn. St. 290; *Provolt* v. *Chicago, Rock Island & Pac. R. R. Co.* 57 Mo. 256.

The owner, by laches or waiver, may lose his right to enjoin the trespass or his right to an action of ejectment to regain possession. *Wichita & W. R. R. Co.* v. *Fechheimer* (*supra*); *Buckwalter* v. *A. T. & S. F. Ry. Co.*, 64 Kan. 403, but title or unconditional right to enjoy the free use of the property taken does not

accrue until the damages incident to its appropriation are paid.

It appears from the bill that Zimmerman's suit was brought before the foreclosure suit was instituted and before defendant purchased the railroad; that the same was, with the full knowledge of defendant company, pending at the time of the judgment of foreclosure and purchase by the defendant. The judgment subsequently rendered in that suit would, of course, be conclusive as to Zimmerman's damages so far as the Wyandotte Company itself was concerned. This is not disputed. It is, in our opinion, equally conclusive against the purchasing company.

In the case of *Pfeifer* v. *Sheboygan & Fond du Lac R. R. Co.* 18 Wis. 155, it appears that the plaintiff was owner of lands taken by a railroad company for public use; that legal proceedings were had to assess the damages which resulted in a judgment in the owner's favor, which was not paid. The road was subsequently sold in foreclosure proceedings, purchased by a committee and resold to defendant railway company. It took possession thereof, including the right of way over plaintiff's lot. The action was brought to compel the new road to pay

the amount of the judgment against its predecessor. The court held that the new company, by taking possession of plaintiff's lot and operating its road over it, subjected itself to the condition, on which its predecessor held it, of paying the judgment against it for damages.

To the same effect are the following cases: *Gilman* v. *Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653; *Drury* v. *Midland R. R. Co.* (*supra*); *Bridgman, Administrator,* v. *St. Johnsbury & L. C. R. R. Co.* 58 Vt. 198; *Western Penn. R. R. Co.* v. *Johnston,* (*supra*); *Rio Grande & E. P. Ry. Co.* v. *Ortiz,* 75 Tex. 602; *Organ* v. *Memphis & L. R. R. Co.* 51 Ark. 235; *Lake Erie & Western Ry. Co.* v. *Griffin,* 107 Ind. 464; *Chicago & S. E. R. Co.* v. *Galey,* 141 Ind. 360

The principles announced in the foregoing authorities, without quoting at length from them, may be summarized as follows: under constitutions and laws similar to those of Kansas the land owner's right to damages sustained by an appropriation of his land by railroad corporations is paramount to the rights of a subsequent mortgagee; a purchaser from the company originally appropriating the land holds title to it, subject to the condition of paying the damages

occasioned by the appropriation and a judgment for such damages secured against the original company is conclusive against the purchasing company.

From the foregoing we think it follows conclusively that defendant should not be permitted to continue the use of plaintiff's lot without paying the damages awarded to him, unless the decree in the foreclosure suit determines otherwise.

Many of the cases cited (*supra*) deal with the liability of railroad companies purchasing property under decrees of foreclosure of mortgages, like that involved in this case. There is no suggestion in any of them that such fact presents an obstacle to the assertion of liability against the purchasing company; neither do we perceive how such fact could in itself vary the general rule announced in those cases. But it is earnestly contended by counsel for defendant, that complainant has no rights except such as were conferred by the decree of foreclosure and that his only remedy to secure compensation for the lot taken was by intervention in the foreclosure suit.

The provision of the decree on which reliance is placed is fully set out in the

statement preceding this opinion. It reserved jurisdiction "as against the parties to this suit and as against said purchaser at said contemplated sale, to determine whether claims contracted by the mortgagor or the receiver were valid and entitled to priority over the mortgage debt." This reservation is limited in its character. It does not purport to reserve jurisdiction over all persons, but only over the parties to the suit, including the purchaser of the property and then only for the purpose of determining the validity and priority over the mortgage debt of claims contracted by the mortgagor or receiver.

Plaintiff's intestate was not a party to the foreclosure suit, and it was of no consequence to him whether his claim was prior in right or equity to the mortgage debt or not. He was not asserting any preferential claim but was standing on the right guaranteed to him by the constitution of his state, that his property should not be taken for public use without payment of just compensation. The Wyandotte Company never made this payment and accordingly, acquired no title to the lot. It could therefore convey no title by mortgage or otherwise so as to free the purchaser, provided he desired to continue the use of the lot,

from performance of the fundamental condition on which its use depended. This, Zimmerman knew, because it was the law of the land. He had no occasion to ask the court in charge of the foreclosure proceedings to protect his rights or decree him a lien superior to the mortgage debt. He had no lien strictly speaking, but did have a remedy superior to the enforcement of any lien and co-existent with the use that any subsequent purchaser might make of his lot, and that was to require such purchaser to perform the condition upon which such use depended.

As said by the late Judge Simonton in *Wheeling Bridge & Terminal Ry. Co.*, v. *Reymann Brewing Co.*, 90 Fed. 189, 193: "It is not a question of a preferential claim, in the sense of a claim having superior equities to the mortgage debt. It is the payment of the claim which outranks the mortgage, independent of it, unaffected by the proceedings for foreclosure."

We have no occasion in this case to consider and therefore refrain from expressing any opinion of the possible effect of want of knowledge by the purchaser of the lot owner's claims, prior to the purchase. The bill under consideration

shows that the defendant purchased the railroad with actual knowledge of Zimmerman's claims.

We do not question the soundness of the doctrine urged upon us by defendant's counsel, based on the cases of *Jesup* v. *Wabash, St. L. & P. Ry. Co.* 44 Fed. 663; *Thompson* v. *N. Pac. Ry. Co.* 93 Fed. 384, to the effect that claims against the receiver must be presented to the court appointing him, in cases where the payment of such claims is, by the decree imposed upon the purchaser as a part of the purchase price. But in our opinion, the case before us depends for its solution upon principles not involved in them. Neither do we doubt that Zimmerman might have waived his constitutional right to insist upon the pre-payment of his damages and have elected to hold the trespassing company in a personal action only for damages, thereby foregoing his constitutional protection and extending personal credit to the company. But such is not this case. Zimmerman waived the trespass but treated the railroad company as exercising, though informally, its right of eminent domain, and as a recognized substitute for the procedure provided by statute, brought his suit for the damages sustained by the taking and appropriation of his lot.

By authority of the Kansas cases above cited the judgment secured in such a suit was the equivalent of the award of damages contemplated by the statute. (Secs. 1359 *et seq.*) and under the constitution and laws of Kansas, entitled the owner to full payment thereof as a condition recedent to disvestiture of his title.

We are unable to see how the statute of limitations can afford protection to the defendant. Zimmerman excused the unlawful entry, waived the trespass and treated the entry as the exercise of the right of eminent domain. He seasonably brought his suit for an award of damages, and in 1897, secured judgment therefor. In 1899 this suit was instituted. No statute of which we are aware barred Zimmerman's right of action at that time.

We have purposely refrained from referring to the proceedings in the court below relative to the filing and striking out of the amended bill and granting leave to file an intervening petition in the foreclosure case. All questions determinative of the rights of parties are, in our opinion, presented by the demurrer to the first bill filed in the court below, and as we find nothing in the course of procedure afterwards, affecting the rights

so presented, we do not deem it necessary to further consider them. The trial court, in our opinion, committed error in sustaining the demurrer to the bill. The decree must therefore be reversed and the cause remanded with instructions to proceed in harmony with this opinion.

Filed March 3, 1906.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

In *Robinson* v. *Caldwell*, 165 U. S., 359; s. c. 41 L. C. P. 745 this court passed upon the question here involved. The syllabus is as follows:

> "An appeal to this court from the Circuit Court on the ground that the jurisdiction of the Circuit Court is in question cannot be maintained when the appellant has also taken an appeal to the Circuit Court of Appeals and the whole case on its merits has been determined by it, although the construction of a treaty and the constitutionality of an act of Congress were drawn in question in the Circuit Court; such case can be taken to this court only upon *certiorari* after final decree upon the merits in the Circuit Court of Appeals."

In the opinion the court said:

> "We are of the opinion that the present

> appeal must be dismissed. After the final decree upon *the merits in the Circuit Court of Appeals*, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon *certiorari*."

In this case Robinson, of course, took the appeal in both instances, but this can make no difference, for if one party is bound by a decree of a court the other must also be bound and if the company was not satisfied with the decision of the Court of Appeals it should have obtained a review of this case on *certiorari*, as suggested in the last paragraph of the court's opinion.

In *Carter* v. *Roberts*, 177 U. S. 496; s. c. 44 L. C. P., 861 this court again announced the law to be as follows:

> "A direct appeal to the Supreme Court of the United States from a decision of a Circuit Court involving a constitutional right cannot be taken, under the act of Congress of March 3, 1891, after the cause has been appealed to and decided by the Circuit Court of Appeals, as that act does not permit *independent appeals to both courts*."

In the opinion the court says:

> "But when the Circuit Court of Appeals has acted on the whole case its judgment

> stands unless revised by *certiorari* to or appeal from that court in accordance with the act of March 3, 1891."

In *Ayers* v. *Polsdorfer,* 187 U. S. 585; 47 Law Ed. 314, this court in the opinion says:

> "Therefore, when the jurisdiction of the Circuit Court is invoked solely on the ground of diversity of citizenship, two classes of cases can arise, one in which the questions expressed in Sec. 5 appear in the course of the proceedings and one in which other Federal questions appear. *Cases of the first class may be brought to this court directly, or may be taken to the Circuit Court of Appeals. But if taken to the latter court they cannot then be brought here.* Cases of the second class must be taken to the Circuit Court of Appeals, and its jurisdiction will be final. The case at bar falls under one or under the other of those classes."

This principle is again affirmed in *Cincinnati, Hamilton & Dayton R. R. Co.* v. *Thiebaud,* 177 U. S. 615; s. c. 44 L. C. P. 911.

Also in the case of *Cary Mfg. Co.* v. *Acme Flexible Clasp Co.,* 187 U. S. 427; s. c. 47 Law Ed. 244.

In the last mentioned case this court, in the opinion, says:

> "But it is settled that even if a party

> might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the Circuit Court of Appeals, he must abide by the judgment of that court."

If it should be urged that in these cases the appeal, both to the Court of Appeals and to the Supreme Court, was taken by the same party, the answer is this: The Circuit Court of Appeals was created for the purpose of relieving this court of certain of its burdens and when the parties litigant have had the benefit of the wisdom of the Circuit Court of Appeals *or* of the Supreme Court, in one of that class of cases that might go to either, then the purposes of the law have been fulfilled. If one of those cases that might go to either court, but cannot go to both, could be taken to the Court of Appeals and *then* taken to the Supreme Court, a large part of the burden, of which, the act was intended to relieve this court, would continue to rest upon it. It can make no possible difference at whose instance or by whose invocation the judgment and wisdom of the Appeals Court was obtained. The Circuit Court of Appeals passed upon the merits of the case and the question of jurisdiction without reference to which of the parties litigant brought the case before it. The plaintiff invoked the wisdom of that court; the defendant derived benefit from it as much as the complainant, and is bound by it as much as the complainant.

The appellant herein was properly before the

Court of Appeals; it presented its brief on the question of jurisdiction, as well as on the merits of the cause; it has permitted the judgment of the Court of Appeals to become final, and the mandate to be sent from that court directing the lower court to proceed in accordance with its views as expressed in its opinion; in accordance with the opinion and mandate of the Court of Appeals, the lower court acted; under the law it was bound to follow the instructions of the Court of Appeals, since the defendant had taken no action of any kind to have the decision of the Court of Appeals reviewed by this court *on certiorari*. To hold that the defendant could remain silent and wait until the lower court acted, render a decree in accordance with the decision of the Court of Appeals and then appeal to this court, when it knew, under the law, the lower court was bound to follow the views of the Court of Appeals as the law of the case, would be making the action of the Court of Appeals in rendering its opinion a vain and foolish performance. To permit either party to present exactly the same question to this court that was presented to the Court of Appeals is holding that all that thatcourt did amounted to nothing.

To so hold is to hold that the appellant company could obtain an appeal from the decision of the Court of Appeals without regard to the decision of the Court of Appeals and without in any manner trying to obtain relief from that decision by *certiorari* or appeal as provided by law; but on

the contrary acquiescing in its decision and well knowing that the lower court must follow its directions, waits until it does, not changing its position in any manner, shape or form, it then seeks to have reviewed in this court the whole proceeding without regard to anything that has been said by the Court of Appeals upon the same propositions.

We therefore submit that this case falls within the principle announced in the above decisions and should be dismissed.

JOHN H. ATWOOD,
Solicitor for Appellee.

W. W. HOOPER,
of Counsel.

In the Supreme Court of the United States

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY,
Appellant.

vs.

FREDERICK ZIMMERMAN, AS ADMINISTRATOR, ETC., ET AL,
Defendant.

APPELLANT'S BRIEF ON APPELLEE'S MOTION TO DISMISS.

STATEMENT OF FACTS.

On the 2nd day of February, 1889, L. Zimmerman, now deceased, began his action in the District Court of Leavenworth county, Kansas, against the Kansas City, *Wyandotte* & Northwestern Railroad Company to recover damages to real property in Leavenworth abutting on a

street, on account of construction of a railroad in said street, and on the 15th day of May, 1897, recovered a judgment for $3,000.00. (Rec., p. 54.)

In January, 1888, the Kansas City, *Wyandotte* & Northwestern Railroad Company mortgaged all of its road and franchises to the Farmers' Loan & Trust Company of New York (Rec., p. 54), and about March 21st, 1890, the said Trust Company instituted its action against said Railway Company, in the Circuit Court of the United States for the district of Kansas, to foreclose the mortgage (Rec., p. 54), and a Receiver was appointed by said court. On the 18th day of January, 1893, a decree of foreclosure was entered by the Circuit Court, and in 1894 all of the property of the Kansas City, Wyandotte & Northwestern Railroad Company was sold to purchasing trustees, who thereupon conveyed the same to the appellant, "The Kansas City Northwestern Railroad Company, a Kansas corporation." (Rec., p. 55.) The decree of foreclosure provided that (Rec., p. 55):

> "This court hereby reserves to itself from this decree the power and jurisdiction, both as against the parties to this suit and as against said purchaser at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid, and entitled to priority over the mort

gage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper."

And the order of confirmation provided that (Rec., p. 56):

> "And said master commissioner is ordered and directed to make to the purchasers at said sale, to-wit: George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report to said purchasers—said report being confirmed, however, subject to the provisions of said original decree, and subject to the provisions to be contained in the deed executed by said master commissioner to said purchaser."

And, by order of the court (Rec., p. 56) the following was endorsed on the deed:

> "The foregoing deed examined and approved subject to the condition that the purchaser take the property subject to all the orders of the court relating to the payment of the debts of the company, and the receiver, and said property shall remain liable for such debts, if any there are remaining unpaid.
>
> HENRY C. CALDWELL, *U. S. Circuit Judge.*"

On the 21st day of May, 1899, L. Zimmerman commenced his action in the District Court of Leavenworth county, Kansas, against the appellant, the Kansas City Northwestern Railroad Company, to compel that company to pay the judgment for $3,000.00 which he had recovered

in May, 1898, against the Kansas City, *Wyandotte* & Northwestern Railroad Company (Rec., p. 54)—the defendant in the foreclosure suit—and to enjoin the operation of the road until it was paid. Neither L. Zimmerman nor the Kansas City Northwestern Railroad Company was a party to the foreclosure suit. Each was a citizen of the state of Kansas.

In the petition filed in the State District Court, the plaintiff based and founded his action upon the decree of the Circuit Court in the foreclosure suit (Rec., p. 5). On application of the defendant, the suit was removed to the Circuit Court—not upon the ground of diverse citizenship, but upon the erroneous assumption that, because the action was founded upon the decree of the federal court, it involved a federal question. When the record was filed in the Circuit Court on removal, the plaintiff re-cast his petition to conform to the equity rules. (Rec., pp. 16-23.) The defendant filed a demurrer (Rec., pp. 44-46), which was sustained, upon the sole ground that the court had no jurisdiction. (Rec., pp. 47-48.)

> "The foundation of complainant's demand against the defendant railroad company is the judgment of three thousand dollars obtained by complainant's intestate against the Kansas City, Wyandotte & Northwestern Railroad Company in the State Court. If complainant may compel satisfaction of that judgment, or any part of it, against the defendant railroad

company, as assignee of the purchasing committee which purchased the property of the Kansas City, Wyandotte & Northwestern Railroad Company at a foreclosure sale of that property, it is, by reason of the terms of the decree entered in the Federal Court under which the purchase was made, and by reason of the terms of the deed, based upon that decree by which the purchasing committee took title to the property. That decree referred to in complainant's amended bill of complaint expressly provides as follows:

'This court hereby reserves to itself from this decree the power and jurisdiction, both as against the parties to this suit, and as against said purchaser at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid, and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper, etc.'

Hence, in my judgment, the District Court of Leavenworth county, Kansas, had no jurisdiction to either enforce the judgment in suit against the assignee of the purchaser under such decree, or to determine the validity and extent of the judgment now in suit, or to establish such judgment as a lien on the property purchased under the decree superior to the mortgage liens therein foreclosed, and that this court, by removal of this cause from the State Court

required only such jurisdiction and power to determine as the State Court possessed, and might have exercised had no removal been obtained. That the proper method of obtaining satisfaction of the judgment in suit from the defendant company, or out of property of the Kansas City, Wyandotte & Northwestern Railroad, by it purchased under the decree, if any such may be obtained by complainant, is by intervention in the original foreclosure suit in which the decree relied upon by complainant was entered.

It follows, the motion to remand to the State Court must be denied, and the amended demurrer to the amended bill of complaint must be sustained, with leave to apply to this court for leave to file an intervening petition in the original suit of the Farmers' Loan & Trust Company of New York, against the Kansas City, Wyandotte & Northwestern Railroad Company, et al., number 6472, equity on the dockets of this court.

JOHN C. POLLOCK, *Judge.*"

From this order of the Circuit Court Zimmerman perfected appeal to the United States Circuit Court of Appeals. (Rec., pp. 61-62.) The order of the Circuit Court sustaining the demurrer to the bill of complaint, on the appeal of the complainant, was reversed by the Circuit Court of Appeals, and the cause remanded, "with instructions to proceed in harmony with this opinion."

Thereafter the Circuit Court, on due proceedings had, entered a final decree (Rec., pp. 53-56) in favor of the complainant, and allowed an appeal on application of ap-

pellant to this court. (Rec., pp. 58-9.) (See also supplemental transcript of record.) The Circuit Court of Appeals declined to view the case as one of jurisdiction, and proceeded to a consideration of the equities of complainant's bill, which the Circuit Court had not yet passed upon, holding them sufficient to entitle him to the relief asked, and remanded the case, as before stated, "with instructions to proceed in harmony with this opinion." Thereupon the defendant re-filed its demurrer, which was overruled (Rec., p. 52), and a decree *pro confesso* was entered.

ARGUMENT.

FIRST.

THE DISTRICT COURT OF LEAVENWORTH COUNTY HAD NO JURISDICTION OF THE SUBJECT MATTER OF THE ACTION INSTITUTED IN THAT COURT BY ZIMMERMAN AGAINST THE KANSAS CITY, NORTHWESTERN RAILROAD COMPANY, BASED, AS IT WAS, UPON THE DECREE OF FORECLOSURE IN THE FEDERAL COURT.

It conclusively appears from the record that the Federal Court, in the foreclosure suit, expressly retained juris-

diction "to hear and adjudicate all pending and undetermined claims, * * * whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine, as to said claims, whether they are or are not valid and entitled to priority over the mortgage debts, * * * and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper." That order is now in force.

It would seem that our contention that the State Court had no jurisdiction is settled by this court in the case of *Wabash R. R. Co.* v. *Adelbert College, etc.*, in the opinion handed down on January 6th, 1908, and not yet published in reports. The case is identical in point with the facts of the case at bar. In that case Mr. Justice Moody, speaking for the court, said that:

> "The effect of the decree is to say to any purchaser under it: 'You must take this property subject to all claims which this court shall hereafter adjudge to be lawful, and you may be assured that you will be held to pay none other, and for the purpose of making this statement good, the court reserves jurisdiction over the property and claims in respect to it, and the right to take it again into possession, and exercise again the power of sale.' It is obvious therefore, that the court has parted with the possession of the property only conditionally, and that it has preserved complete control over it, and full jurisdiction over the claims which might be made against it. We may now consider the question whether the

state court had the jurisdiction to render the judgment in the case at bar, as and when it was rendered.

When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto, and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship, or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of especial importance with respect to the relations of those courts, which might exercise independent jurisdiction in the same territory, often over the same property, persons and controversies. They are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice, and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the

courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union.

Hagan v. *Lucas*, 10 Pet., 400;
Williams v. *Benedict*, 8 How., 107;
Wiswall v. *Sampson*, 14 How., 52.;
Peale v. *Phipps*, 14 How., 368;
Pulliam v. *Osborne*, 17 How., 471;
Taylor v. *Carryl*, 20 How., 583;
Freeman v. *Howe*, 24 How., 450;
Buck v. *Colbath*, 3 Wall., 334;
Yonley v. *Lavender*, 21 Wall., 276;
People's Bank v. *Calhoun*, 102 U. S., 256;
Barton v. *Barbour*, 104 U. S., 126;
Krippendorf v. *Hyde*, 110 U. S., 276;
Pac. R. of Mo. v. *Mo. Pac. Ry.*, 111 U. S., 505;
Covell v. *Heyman*, 111 U. S., 176;
Heidritter v. *Elizabeth Oil Cloth Co.*, 112 U. S., 294;
Gumbell v. *Pitkin*, 124 U. S., 131;
Johnson v. *Christian*, 125 U. S., 642;
Morgan's Co. v. *Texas Cen. Ry.*, 137 U. S., 171;
Porter v. *Sabin*, 149 U. S., 473.

The state courts in the case at bar, in deference, it is said by counsel, to these well-established principles, deferred action until after the property had been conveyed to the purchasers under the decree of foreclosure, and the receiver discharged. Upon the termination of the receivership, it is urged, the exclusive jurisdiction of the Circuit Court ended, and the right of the state court to resume its normal jurisdiction revived. As this suit was begun before the property was taken into

the possession of the Circuit Court, and when, therefore, the state court had jurisdiction over it, and remained dormant, except for the addition of parties and the filing of pleadings and service of process, until after the receivers had been discharged and the property conveyed to the purchaser, this would be true, if, as in *Shields* v. *Coleman*, 157 U. S., 168, the possession of the Circuit Court and its relation to the *res* had come to an end. But the Circuit Court attempted, in the decree of March 23rd, to prolong its control of the property, beyond the conveyance to the purchasers, and the discharge of the receivers, up to the point of time when the claims therein stated should be ascertained, and the just remedy for them applied, and to reserve the right to retake the property for those purposes. The effect of reservations in a decree of foreclosure, which, to say the least, were no broader than those in this decree, was before the court in *Julian* v. *Central Trust Co.*, 193 U. S., 93. The reservations in that case are stated on page 110, and of them the court said (p. 111):

'It is obvious that, by this decree of sale and confirmation, it was the intention and purpose of the federal court to retain jurisdiction over the cause, so far as was necessary to determine all liens and demands to be paid by the purchaser.'

And again, (p. 112):

'The federal court, by its decree, reserved the right to determine what liens or claims should be charged upon the title conveyed by the court.'

And again, (p. 113):

'The Circuit Court, by the order made, retained jurisdiction of the case to settle all claims against the

property, and to determine what burdens should be borne by the purchaser, as a condition of holding the title conveyed.'

Here was a clear determination by this court that the exclusive jurisdiction of claims against a *res*, which had arisen out of the possession of the *res* in judicial proceedings for foreclosure of mortgages, might be continued after sale and conveyance of the property, for the purpose of deciding what claims were legally chargeable against it. This is precisely what the Circuit Court attempted to do with respect to the property now before us, and its right to do it is clearly supported by the decision in the Julian case. Under the reservations in that case, the Circuit Court was held to have power to protect the property sold by its order from sale on an execution issued by a state court. The state court was thought to be without power to direct such a sale, even though its judgment was based upon a claim arising after the conveyance of the property, because, under the peculiar facts of the case, the judgment and execution in effect annulled the federal decree. The principle underlying that case, however, which is material here, is that the jurisdiction over the *res* could be continued by reservations, after the physical possession of the property had been abandoned. This court (p. 112) said there:

'The federal court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.'

It needs but a moment's consideration of the facts in the case at bar to convince that if the exclusive jurisdiction of the federal court were denied, every evil

which that doctrine was designed to avert would be let in. Some time, it is to be supposed, there will be a sale by order of the federal court to satisfy Compton's lien. If the sale by the state court of the same property to satisfy other lien-holders of equal rank with Compton is allowed to proceed, which sale will convey the better title? Who would be bold enough to determine for himself that question? How much longer would the litigation with respect to this property continue if two persons could be found to purchase at the two sales? It is no answer to these questions that Compton has been made a party to this suit in the state court. He is still a party to the proceedings in the federal court, and he must find satisfaction for his claim there. We are of the opinion that, by the effect of the reservation in the decree of March 23d, 1889, the exclusive jurisdiction of the federal court over the property therein dealt with has continued, notwithstanding the conditional conveyance, and that it still exists. The defendants in error must pursue their remedy in that court, which doubtless will consider the decisions of the state courts on questions of state law with the respect which the decisions of this court require. It follows, therefore, that the state court was without power to decree a sale of the property, and its judgment must be reversed."

The Circuit Court, in the foreclosure suit, acquired jurisdiction on the 31st day of March, 1890, (Rec., p. 54), and the suit against the Kansas City Northwestern Railroad Company was commenced on the 21st day of May, 1899, (Rec., p. 54), about nine years after the federal court acquired jurisdiction.

Many times has this court decided that "such jurisdiction cannot be divested or arrested by subsequent proceedings in another court."

Hockrader v. *Wadley*, 172 U. S., 148;
In re Chatwood, 165 U. S., 443;
Farmers, etc., Trust Co. v. *R. R. Co.*, 154 U. S., 51.

The Zimmermans, at no time, attempted to intervene in the foreclosure suit. The state court, therefore, had no jurisdiction of the subject-matter.

SECOND.

ON REMOVAL FROM THE STATE COURT TO THE CIRCUIT COURT, IF PROPERLY REMOVED, THE CIRCUIT COURT ACQUIRED NO WIDER JURISDICTION THAN THE STATE COURT HAD FROM WHICH IT WAS REMOVED.

This proposition has often been announced by this court in many decisions, and it would seem only necessary to refer to a few of such decisions.

In the case of *E. Tenn. V. & G. R.* v. *South Tel.*, 112 U. S., 310, the principle was announced that the courts of the United States, on removal of a suit from a state court, are "clothed with no greater power in the premises than the courts of the state would have possessed if their jurisdiction had been preserved."

Randall v. *Howard*, 2 Block (U. S.), 589.

In the case of *Swift* v. *R. R. Co.*, 58 Fed., 861, it was said that:

> "The courts of the United States upon removed cases have no wider jurisdiction than the courts of the states from which they were removed. The removal simply transfers the hearing from the state court to the national tribunal, but does not enlarge the right of the court to hear the cause."

To the same effect:

Barrow v. *Hunton*, 99 U. S., 80-85;

Minnesota, etc., v. *St. Paul*, 2 Wall., 633.

THIRD.

THE SUIT WAS IMPROPERLY REMOVED FROM THE STATE COURT. THE CONSTRUCTION OF THE DECREE OF THE FEDERAL COURT DID NOT INVOLVE A FEDERAL QUESTION, AND THEREFORE THE CIRCUIT COURT WAS WITHOUT JURISDICTION.

"The fact that a judgment was recovered in a court of the United States does not, in a suit upon the judgment, raise a question under the laws of the United States, within the meaning of the act of March 3d, 1875."

Provident Savings Society v. *Ford*, 114 U. S., 635;

Leather Mfg. Bank v. *Cooper*, 120 U. S., 778;

Sweringer v. *St. Louis*, 185 U. S., 44;

Carson v. *Dunham*, 121 U. S., 427-8;

Rand v. *Walker*, 117 U. S., 340;

Metcalf v. *Watertown*, 128 U. S., 586;

If the petition in the state court did not present a cause of action which involved a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, the Circuit Court acquired no jurisdiction, and, within the rule announced by this court in the case of *Defiance Water Co.* v. *Defiance*, 191 U. S., 185-194, the judgment of the court below should be reversed.

Newburyport Water Co. v. *Newburyport*, 193 U. S., 576;

R. R. Co. v *Swan*, 111 U. S., 379-382;

Metcalf v. *Watertown*, 128 U. S., 586;

Morris v. *Gilmer*, 129 U. S., 315;

Bank v. *Buford*, 191 U. S., 119.

(See pages 37 to 45 of original brief filed herein.)

The fact that the defendant, in the state court, secured a removal of the cause to the Circuit Court, upon a mistaken view of the law, could not operate to give the Circuit Court jurisdiction, and the judgment rendered should be set aside and vacated, if it affirmatively appears that the cause was improperly removed.

Carson v. *Dunham*, 121 U. S., 427-428;

Wabash R. R. Co. v. *Barbour*, 73 Fed., 513, 514;

Postal Tel. v. *Alabama*, 155 U. S., 487;

Arkansas v. *Kan.*, 183 U. S., 185;

Boston v. *Montana*, 188 U. S., 639;

Wetmore v. *Rymer*, 169 U. S., 115;

Mexican R. R. v. *Davidson*, 157 U. S., 208;

Tenn. v. *Union Bank*, 152 U. S., 454, 460;

Ex parte Wisner, 203 U. S., 449.

FOURTH.

THE DECISION AND JUDGMENT OF THE CIRCUIT COURT OF APPEALS REVERSING THE JUDGMENT OF THE CIRCUIT COURT WAS NOT A FINAL JUDGMENT, WHICH COULD HAVE BEEN REVIEWED BY THIS COURT BY WRIT OF ERROR, CERTIORARI, OR OTHERWISE.

The learned counsel for appellee, in presenting the motion to dismiss the appeal from this court, has certainly overlooked Sections 5 and 6 of the Act of March 3d, 1891. (26 Stat., 827.)

By Section 6 it is provided, among other things, that:

> "The judgments and decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is *dependent entirely* upon the opposite parties to the suits or controversy, being aliens and citizens of the United States, or citizens of different states."

Nothing of this character appears in the record. Indeed, the very reverse appears. Therefore, the judgment of the Circuit Court of Appeals is not made final by the statute. The judgment, however, of the Circuit Court of Appeals conclusively shows that it was not intended to be final. The concluding part of the decision is that the judgment of the Circuit Court "be reversed, and the

cause remanded, with instructions to proceed in harmony with this opinion." (144 Fed., 622; Rec., p. 65.)

In the case of *Hazeltine* v. *Cent. Bank*, 183 U. S., 131, an attempt was made in this court to review a judgment of the Supreme Court of Missouri, in which it was ordered by said court that the judgment of the trial court be reversed, and the cause remanded "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered."

In sustaining the motion to dismiss, this court said:

> "We have frequently held that a judgment reversing that of a court below, and remanding the case for further proceedings, is not one to which a writ of error will lie."
>
> *Great Western Tel. Co.* v. *Burnham*, 162 U. S., 339.

A similar ruling was made by this court in the case of *Schlosser* v. *Hemphill*, 198 U. S., 175.

In the case of *United States* v. *Krall*, 174 U. S., 385, it was said that:

> "On the face of the decree of the Circuit Court of Appeals in this case the judgment is not a final judgment, and the appeal must, therefore, be dismissed."

Appellant never had a chance to appeal until final

decree herein, because, until then, no judgment adverse to it had been rendered. Before that time a judgment against complainant had been rendered, from which he prosecuted an appeal to a court lacking jurisdiction. The conclusion of that court, thus lacking jurisdiction, was not binding upon defendant, appellant here. The appellant is now, for the first time, before a court competent to entertain its appeal on the subject of the jurisdictional incapacity of the Circuit Court.

Union & Planters Bank v. *Memphis*, 189 U. S., 71-74;

Scott v. *Laney*, 19 How. (U. S.), 427;

Pennoyer v. *Neff*, 95 U. S., 728;

Kimball v. *Kimball*, 174 U. S., 163;

FIFTH.

THIS COURT HAS JURISDICTION ON THIS APPEAL TO DETERMINE WHETHER THE CIRCUIT COURT, IN ENTERING THE FINAL DECREE, HAD JURISDICTION.

This appeal, taken under the Act of March 3rd, 1891, Section 5, provides:

> "That appeals or writs of error may be taken * * * from the existing Circuit Courts direct to the Supreme Court in the following cases: *In any case* in which the jurisdiction of the court *is in issue, etc.*"

There has never been any trial in the Circuit Court on the merits. The demurrer was sustained by the Circuit Court *solely* on the ground of jurisdiction. (See opinion of Circuit Court, Rec., pp. 47-48.) The Circuit Court of Appeals, as shown by the Record, reversed the judgment of the Circuit Court, upon questions never decided by the Circuit Court. The decision of the Court of Appeals was that the Constitution of the state ordained that complainant's right-of-way damages should be first paid, or secured to be paid, before right-of-way title could pass to the railroad company, and that the claim for such damages was properly enforcible in the state court from which the removal had been taken. If such were the case, it constituted, therefore, the strongest reason for denying federal

jurisdiction, because, diversity of citizenship not existing, and the case not arising, in the opinion of the court of appeals, under the Constitution, laws or treaties of the United States, the Circuit Court and equally the Circuit Court of Appeals, was absolutely without jurisdiction.

The question of jurisdiction was raised by the defendant (appellant) at every stage of the proceedings in the Circuit Court, and only that question, and there was at no time, either in the Circuit Court or in the Circuit Court of Appeals, any final judgment against it which could be reviewed, under the act of March 3d, 1891, by this court, by appeal or writ of error, or otherwise, until the final decree in the Circuit Court. There was no other question but that of jurisdiction in the Circuit Court, which it contested, or from which it could appeal, and the motion to dismiss (see motion) this appeal is for "the reason that all the matters sought to be reviewed in this court have been reviewed by the United States Circuit Court of Appeals for the Eighth Circuit, and decided adverse to said appellant company, *and said judgment has become final;*" and this notwithstanding that judgment remanded the cause, *"with instructions to proceed in harmony with this opinion."*

Schlosser v. *Hemphill*, 198 U. S., 175;

McLish v. *Roff*, 141 U. S., 661.

But does not the decision of this court in the case of *American Sugar, etc., Co.* v. *New Orleans*, 181 U. S., 277, settle the following propositions, viz.:

First. That the Circuit Court of Appeals had no appellate jurisdiction to review the judgment of the Circuit Court; and

Second. That the appellate jurisdiction of this court under the act of March, 1891, is exclusive?

The petition filed in the state court does not allege or claim that the plaintiff and defendant were citizens of different states. The amended complaint in the Circuit Court has no such allegation. The claim and cause of action is based and founded upon a decree of the federal court. On that ground it was removed to the federal court, as involving a construction of the Constitution and laws of the United States. Under such circumstances, has not this court decided (181 U. S., 277) *supra*, that its "*appellate jurisdiction is exclusive?*"

If the petition in the state court did not present a cause of action which involved a federal question, under the removal acts, the Circuit Court never acquired jurisdiction. If it did present such cause of action, and was properly removed, there being no diversity of citizenship, the Circuit Court of Apppeals had no appellate jurisdiction; for, as said by this court *in re* 181 U. S., 281, if,

under such circumstances, it did have appellate jurisdiction, "the right to two appeals would exist in every case * * * where the jurisdiction of the Circuit Court rested solely on the ground that the suit arose under the Constitution, laws or treaties of the United States, if such cases could be carried to the Circuit Court of Appeals, for their decisions would not come within the category of those made final," and therefore this court held that, "as those cases fall strictly within the terms of Section Five, the *appellate jurisdiction of this Court in respect of them is exclusive.*"

If the Circuit Court of Appeals had no appellate jurisdiction—which would seem clear from this decision—what, then, is the status of the judgment of the Circuit Court sustaining the demurrer to the bill of complaint? Has that judgment been reversed?

In the case of *Martin* v. *Hunter*, 1 Wheat. (U. S.), 364, it was said by Justice Story, speaking for the court, that:

> "It is an acknowledged principle, I believe, by every court in the world that not only the decisions but everything done under the judicial process of courts not having jurisdiction, are *ipso facto* void."
>
> *Earle* v. *McVeigh*, 91 U. S., 507.

In the case of *Williamson* v. *Berry*, 8 How. (U. S.), 543, it was said that:

"The rule is that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, *and does not create a necessity for appeal.*"

The parties could not consent to give the Circuit Court of Appeals appellate jurisdiction where it had not been conferred by statute.

Cutler v. *Rae*, 7 How. (U. S.), 731;
Gruner v. *U. S.*, 11 How. (U. S.), 164;
People's Bank v. *Calhoun*, 102 U. S., 260.

It has been uniformly held by the Circuit Courts of Appeal that such courts do not have jurisdiction to directly review a judgment of a Circuit Court which sustains an objection to its jurisdiction, and dismisses the suit on that ground.

St. L. C. C. Co. v. *A. L. Co.*, 125 Fed., 196;
The Alliance, 70 Fed., 273; 17 C. C. A., 124;
The Annie Faxon, 87 Fed., 963; 31 C. C. A., 325;
Mnfg. Co. v. *Barber*, 60 Fed., 465; 9 C. C. A. 79;
United States v. *Sutton*, 47 Fed., 129; 2 C. C. A., 115;
Cabot v. *McMaster*, 65 Fed., 533; 13 C. C. A., 39;
Excelsior W. P. Co. v. *Pac. B. Co.*, 109 Fed., 497; 48 C. C. A., 349;
Dudley v. *Board*, 103 Fed., 209; 43 C. C. A., 184;

Hays v. *Richardson*, 121 Fed., 536; 57 C. C. A., 598;

Evans, etc., Co. v. *McCaskill*, 101 Fed., 658; 41 C. C. A., 577;

In re Aspinwall's Estate, 90 Fed., 675; 33 C. C. A., 217;

United States v. *Sutton*, 47 Fed., 129; 2 C. C. A., 115;

Halpin v. *American*, 138 Fed., 548; 70 C. C. A., 462.

The first sentence of the opinion of the Circuit Court of Appeals (144 Fed., 622) discloses the fact that it did not have any jurisdiction, under the act of March 3d, 1891, and under many decisions of this court, and previous decisions of the Court of Appeals rendering the decision (125 Fed., 196), the Court of Appeals had no jurisdiction to review the judgment of the court below.

SIXTH.

THE DECISIONS RELIED UPON IN SUPPORT OF MOTION TO DISMISS HAVE NO APPLICATION TO THE FACTS OF THIS CASE.

The *sole* ground upon which motion to dismiss is based is that, because appellee took an appeal to the Circuit Court of Appeals, the appellant is now and thereby estopped from prosecuting this appeal from the final judgment of the Circuit Court. In each case referred to the appellant to this court had also prosecuted an appeal to the Circuit Court of Appeals, and in each case this court decided, as we read the decisions referred to in support of this motion, that the Circuit Court of Appeals not only had jurisdiction of the cause, but also power, under the act of March 3d, 1891, to render a final judgment in that court.

In this case there was no such appellate jurisdiction, and no such power, and no such judgment was, *in fact*, by it rendered.

We respectfully ask that the motion to dismiss be denied, and that the judgment of the Circuit Court be reversed, and such other order made as to this court may seem proper.

BALIE P. WAGGENER,
Attorney for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY,

Appellant,

vs.

FREDERICK ZIMMERMAN, AS ADMINISTRATOR OF L. ZIMMERMAN, DECEASED,

Appellee.

STATEMENT OF CASE.

For the convenience of the Court, the pleadings in this case will be hereinafter copied in full.

The appellee, on the 21st day of May, 1899, instituted his action in the District Court in and for the County of Leavenworth, State of Kansas, against the Kansas City Northwestern Railroad Company and the City of Leavenworth, by filing his petition, a copy of which is in words and figures as follows, to-wit:

STATE OF KANSAS, *Leavenworth County,* ss:

In the District Court in and for said County.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Petition.

The above named plaintiff complains of the above named defendants and for cause of action against them and each of them alleges: that he is the duly appointed, acting and qualified Administrator of the estate of Leonard Zimmerman, deceased, and that the Kansas City Northwestern Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and owns a railroad, engines, cars, etc., and is operating the same into and through the county and city of Leavenworth and through other counties and Cities in said state; that the said city of Leavenworth is a municipal corporation and city of the first class, under the laws of said State, and has been such during all the times herein mentioned.

Plaintiff further avers that on the 8th day of October, 1872, the Kansas City, Wyandotte & Northwestern Railway Company, a corporation, was duly organized and chartered for the purpose of constructing and maintaining a railroad and telegraph lines in connection therewith and the business of said railway company was to be transacted in the counties in the State of Kansas through which said railroad and telegraph lines passed; and that on the 27th day of September, 1886, the Leavenworth & Olathe Railroad Company, a corporation, was

duly organized and chartered for the purpose of constructing and maintaining and operating a standard and broad guage railroad extending and intended to be run through and from the city of Leavenworth, in the county of Leavenworth, Kansas, then southwesterly through the counties of Leavenworth, Wyandotte and Johnson to the city of Olathe in the last named county.

Plaintiff further avers that after the organization and chartering of the aforesaid companies, they proceeded to condemn, lay out a right of way, and build a railroad through and into the city and county of Leavenworth; that before the completion thereof and to-wit, on the 29th day of March, 1887, the said Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company consolidated under the laws of the State of Kansas, as The Kansas City, Wyandotte & Northwestern Railroad Company, and in the articles of consolidation, the Kansas City, Wyandotte & Northwestern Railroad Company in writing accepted all the rights and privileges, and assumed all the obligations and liabilities of every nature and kind of the aforesaid companies, the Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company; that thereafter said Kansas City, Wyandotte & Northwestern Railroad Company took charge of all the property of the aforesaid two companies, accepted all the rights, franchises and privileges and assumed all the obligations and liabilities of the aforesaid two companies, and proceeded to complete, construct and build said railroad.

Plaintiff further avers that said Leonard Zimmerman in his life time was the owner of fractional lot seven (7) in block seven (7) and lots six (6) and seven (7) in block eight (8) all in Fackler's Addition to the City of Leavenworth, Leavenworth county, Kansas; that Second street

was a duly laid out and established graded street in the city of Leavenworth, running North and South, and running between blocks seven (7) and eight (8) block seven (7) lying on the East side of said Second street, and block eight (8) on the West side of said Second street; that said Zimmerman's property, to-wit, lot seven (7) faces Second street on the East and that said lot six (6) and fractional lot seven (7) faces said Second street on the west.

Plaintiff further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights as aforesaid, proceeded to finish, construct, and build its road in a north-easterly direction through the city of Leavenworth until it came to a point on the south line of fractional lot seven (7) of said L. Zimmerman's property and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractional lot seven (7) and constructed its railroad in the same direction across and over that part or portion of said Second street immediately in front of said L. Zimmerman's property mentioned aforesaid; graded, raised and made a high embankment of a permanent nature and placed rails thereon the whole width of said street and thereby changed and raised the established grade of said Second street to a great height immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money; as will more fully appear hereinafter.

Plaintiff further avers that on the 2nd day of February, 1889, said L. Zimmerman, deceased, began his action against said Kansas City, Wyandotte & Northwestern Railroad Company, in the District Court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs, and that on the 15th day of May, 1897, he duly recovered

in the above entitled court and cause judgment against the defendant, said Kansas City, Wyandotte & Northwestern Railroad Company for the sum of Three thousand dollars ($3,000.00), which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

Plaintiff further avers that afterwards and on the 7th day of May, 1898, said judgment was duly revived in the name of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true copy of the judgment order of revivor hereto attached, made a part hereof and marked 'Exhibit B."

Plaintiff further avers that during this time and about January 2, 1888, the said Kansas City, Wyandotte & Northwestern Railroad Company mortgaged its said road, franchise and equipments to the Farmers' Loan & Trust Company of New York, and that on or about March 21, 1890, the said Trust Company began its action in the Circuit Court of the United States for the District of Kansas, to foreclose its said mortgage, and that on or about the 18th day of June, 1891, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company foreclosing said mortgage and ordering said property to be sold unless within some short time thereafter, in said decree mentioned, said railroad company, or some person or persons for them, should pay the amount of said mortgage indebtedness, with the expense and costs thereof, and that on or about the — day of —— 189— said railroad company and all its equipments, appurtenances, etc., were ordered to be sold and were on or about the — day of —— 189— duly sold to the defendant, the Kansas City,

Northwestern Railroad Company, and that said defendant became the successor in interest to all the rights, franchises and privileges of said Kansas City, Wyandotte & Northwestern Railroad Company, and as part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company and the Kansas City, Wyandotte & Northwestern Railway Company *and the Kansas City, Wyandotte & Northwestern Railroad Company,* under and by virtue of said decree and purchase.

Plaintiff further avers that on the 17th day of November, 1886, the aforesaid Leavenworth & Olathe Railroad Company procured the Mayor and Council of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the city of Leavenworth, and that in said ordinance said Leavenworth & Olathe Railroad Company was granted the right to cross Second street at some point south of the north line of Maple street; also over the South levee Front street, and the South Esplanade from the South line of Fackler's Addition to the North line of Spruce, etc., and that as a condition for the grant and privilege mentioned in said ordinance, it was provided that in all such cases "where the grade of any street or public ground is changed by said company or its successors it shall protect the City from cost and damage at the suits of the property owners;" all of which will more fully appear by a true copy of said ordinance, hereto attached and made part hereof and marked "Exhibit C."

Plaintiff further avers that on or about the 19th day of January, 1887, said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance; and that in and by the articles of consolidation mentioned aforesaid, the Kansas City, Wyandotte & Northwestern

Railroad Company, assumed, accepted and agreed to all the terms, obligations and conditions of said ordinance, and that under and by virtue of the decree of foreclosure and the purchase aforesaid and of accepting and operating said railroad under and by virtue of the ordinances of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, the Kansas City, Northwestern Railroad Company has become liable to said plaintiff for the amount of said judgment with interest and costs.

Plaintiff futher avers that long before the above judgment was obtained all the property of the Kansas City, Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, the Kansas City, Northwestern Railroad Company, and that under and by virtue of said decree and the ordinances of said city, said defendant Kansas City, Northwestern Railroad Company assumed and agreed to pay off any and all obligations of the Kansas City, Wyandotte & Northwestern Railroad Company, and that under and by virtue thereof the Kansas City, Wyandotte & Northwestern Railroad Company has turned over to said defendant railroad company all of its property rights and franchises, and has no property of any kind or description subject to execution, and has refused to pay any part or portion of said judgment, and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company, and that said Kansas City, Wyandotte & Northwestern Railroad Company and defendant Kansas City, Northwestern Railroad Company neglect and refuse to pay the aforesaid judgment or any part thereof, although often thereunto requested.

Plaintiff further avers that said defendant, the City of

Leavenworth, is permitting, aiding and assisting the Kansas City Northwestern Railroad Company, its co-defendant herein, in the operation and maintenance of said railroad within said city in violation of the plaintiff's rights and in violation of said ordinance and of the ordinances of said city, and that it is permitting and aiding and assisting its co-defendant herein to run across said Second street and to maintain its embankments and tracks above the established grade of said Second street to the height of two or three feet or more; all in violation of the aforesaid ordinance and the ordinances of said city, well knowing that the said defendant company, or any person or persons for them, neglect and refuse to pay the aforesaid mentioned judgment or any part thereof, or to duly compensate the property owners for damages they may have sustained by reason of the construction of said railroad, and which said railroad companies, its successors and assigns, have agreed to pay when they accepted the privileges and benefits of said ordinance.

Wherefore plaintiff prays and demands judgment against the defendants, the Kansas City, Northwestern Railroad Company and the City of Leavenworth, for the sum of $3,000.00 with interest at the rate of six per cent, per annum from the 15th day of May, 1897, until paid, and for cost of suit.

Plaintiff further prays that said defendant, the Kansas City, Northwestern Railroad Company, be permanently enjoined and restrained from operating its said railroad over that part or portion of defendant's land appropriated as aforesaid, and from operating and maintaining said embankment across said Second street in front of plaintiff's property until it pays or some person or persons for them the aforesaid mentioned judgment and compensate said plaintiff for the damages and property taken by the afore-

said mentioned railroads, and for all such other and further relief in the premises as plaintiff may be entitled to.

JNO. H. ATWOOD &
W. W. HOOPER.
Attorneys for Plaintiff.

"EXHIBIT A."

Ordinance No. 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth & Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:—

SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company for a period of 20 years from and after the passage of this ordinance, over and upon the following streets and public grounds of the city of Leavenworth, to-wit: Across Limit street on the Southern boundary of the city; also across Second street at some point south of the north line of Maple street; also over the south levee, Front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street, and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth & Olathe Railroad Company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said

right of way, such company or companies to pay the Leavenworth & Olathe Railroad Company a proportionate amount of the costs of the construction and maintenance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use, to be determined by representatives, one to be selected by each company and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad company neglects to name its representative, then the mayor and council of this city shall designate another arbitrator, who shall act with the others in determining the points of difference. Said Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same, and when practicable, shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same shall be determined by the engineer of said company and the city engineer, and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance, all rights under this ordinance shall be forfeited without further action on the part of the city.

Provided that if said company shall be delayed in the construction of its said road in the city of Leavenworth

by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have within which to construct its said track one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall, by writing, accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th, A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD, *City Clerk.*

Passed November 17th, A. D. 1886.

Published November 18th, A. D. 1886.

And thereafter, in due time, the plaintiff in error, The Kansas City Northwestern Railroad Company, duly filed its petition for removal to the Circuit Court of the United States in and for the District of Kansas, a copy of which said petition is in words and figures as follows, to-wit:

In the District Court of Leavenworth County, Kansas.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, and THE CITY OF LEAVENWORTH, Defendants.

Petition for Removal.

To the Honorable The District Court of Leavenworth County, Kansas:

Your petitioner, The Kansas City Northwestern Rail-

road Company, respectfully shows to this honorable court that the matter and amount in dispute in the above entitled cause exceeds, exclusive of interest and costs, the sum of $2.000.

Your petitioner further shows that it appears from the plaintiff's petition filed herein, that on January 2nd, 1888, The Kansas City, Wyandotte & Northwestern Railroad Company, mortgaged its road, franchises and equipment to The Farmers' Loan & Trust Company, of New York, and that on or about the 21st day of March, 1890, the said The Farmers' Loan & Trust Company of New York began its action in the Circuit Court of the United States, for the District of Kansas, to foreclose said mortgage, and that on or about the 18th day of June, 1891, a decree was duly entered against the said, The Kansas City, Wyandotte & Northwestern Railroad Company, foreclosing said mortgage, and ordering said property to be sold; and that thereafter the said property of said, The Kansas City, Wyandotte & Northwestern Railroad Company was duly sold, and the sale was thereafter duly confirmed; and that the said, The Kansas City Northwestern Railroad Company, the defendant herein, became the successor in interest to all the rights, franchises and privileges of said, The Kansas City, Wyandotte & Northwestern Railroad Company, and as a part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company, and The Kansas City, Wyandotte & Northwestern Railroad Company, and The Kansas City, Wyandotte and Northwestern Railroad Company, under and by virtue of said decree and purchase; and the said plaintiff bases his cause of action upon said decree of the Circuit Court of the United States, for the District of Kansas, and upon the constitution and laws of the United States, and that to determine said above cause involves the

construction of said decree, and of the Constitution and of the laws of the United States; and that said above entitled cause is one growing out of said decree and of the sale of the property of the said, Kansas City, Wyandotte & Northwestern Railroad Company to this defendant, which said decree was entered in said cause pending between said, The Farmers' Loan & Trust Company of New York, and The Kansas City, Wyandotte & Northwestern Railroad Company, in the Circuit Court of the United States for the District of Kansas, and involves the construction of said decree and the constitution and laws of the United States.

And your petitioner further shows that the said above entitled suit can be fully and justly determined as between said plaintiff and this petitioning defendant if the same shall be removed to the Circuit Court of the United States for the District of Kansas; and that said controversy between the plaintiff herein and this defendant is a separable controversy, with respect to which separable controversy, the City of Leavenworth, being defendant in the above entitled cause, has no concern; and your petitioner offers herewith a good and sufficient bond for its entering into the Circuit Court of the United States in and for the District of Kansas, First Division, on the first day of the next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety upon the bond, and to cause the said record herein to be removed to the Circuit Court of the United States in and for the District of Kansas, First Division, and your petitioner will ever pray.

WAGGENER, HORTON & ORR,
Attorneys for Defendant, The Kansas City Northwestern Railroad.

STATE OF KANSAS, *County of Atchison, ss*:

W. P. Waggener, being first duly sworn, deposes and says that he is one of the duly authorized attorneys for the defendant, The Kansas City Northwestern Railroad Company; that he has read the within and foregoing petition for removal, and that the matters and things therein stated are true.

W. P. WAGGENER.

Subscribed and sworn to before me this 20th day of June, A. D. 1899.

[SEAL.] S. E. HARBURGER,
Notary Public.

My Commission expires on the 26th day of March, A. D. 1901.

together with a proper bond for removal.

The record was transferred to the Circuit Court of the United States for the District of Kansas, and thereafter, on the 11th day of October, 1899, the plaintiff in said action filed motion in the Circuit Court for permission to amend the petition filed in the state court so that it might conform to the forms of equity pleadings and practice in said Circuit Court, which was allowed.

In pursuance of such motion, plaintiff in error filed its amended bill, which will be found on pp. 17-23 of Transcript of Record. A demurrer was filed to this amended bill, and, on the 18th day of April, 1901, the same was sustained (Transcript of Record, p. 30), and leave was given to file another amended bill of complaint, which was accord-

ingly done, a copy of which is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Amended Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division:

1. Your complainant, Frederick Zimmerman, Administrator of the estate of L. Zimmerman, deceased, and a resident and citizen of Kansas, brought his action in the District Court of Leavenworth county, against the above named defendant, The Kansas City, Northwestern Railroad Company, and the City of Leavenworth, also residents and citizens of the State of Kansas, and upon the petition of the defendant, The Kansas City, Northwestern Railroad Company, claiming that this controversy involved the construction of orders, judgments and decrees of this court rendered and entered in the case of the Farmers' Loan & Trust Company of New York, against the Kansas City, Wyandotte & Northwestern Railroad Company, being case numbered —— of this court, the same was ordered removed from the District court of said county to this Circuit Court of the United States for the District of Kansas, and a transcript of the record of said District court was filed in said Circuit Court on the 18th day of July, 1899, and as-

Second Street was a duly laid out and established graded street in said City of Leavenworth, running north and south, and running between Blocks seven (7) and eight (8); Block seven (7) lying on the east side of Second Street; and Block eight (8) on the west side of said Second street; that said Zimmerman's property, to-wit: Lot seven (7) faces Second Street on the east, and said lot six (6) and fractional Lot seven (7) face said Second Street on the west, and that said Zimmerman owned said lots, and the grade of said street was established long prior to the acquiring of any right of way by said companies, or either of them.

6. Your complainant further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights aforesaid, proceeded to finish, construct and build its road in a northeasterly direction through the City of Leavenworth until it came to a point on the south line of fractional lot seven (7) of said Zimmerman's property, and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractional Lot seven (7) and constructed its railroad in the same direction across and over that part and portion of said Second Street immediately in front of said L. Zimmerman's property mentioned aforesaid, graded, raised and **made a high embankment of a permanent nature the whole** width of said Second Street, and placed iron rails thereon, and thereby changed and raised the established grade of Second street, as long prior thereto established by said City of Leavenworth, to a great height, to-wit, three feet, immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money, as will more fully appear hereafter.

7. Your complainant further avers that on the 2d

day of February, 1889, said L. Zimmerman, now deceased, began his action against said Kansas City, Wyandotte & Northwestern Railroad Company, in the District Court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs, and that on the 15th day of May, 1897, he duly recovered in the above entitled court and cause judgment against the defendant, said Kansas City, Wyandotte & Northwestern Railroad Company, for the sum of Three Thousand Dollars ($3,000.00), with interest thereon from said date at the rate of 6 per cent. per annum until paid, for damages sustained by reason of the appropriation of his land, and the construction of the railroad as aforesaid, which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

8. Your complainant further avers that afterwards and on the 7th day of May, 1898, said action and judgment was duly revived, as provided by law, in the name of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true copy of the judgment order of revivor hereto attached, made a part hereof, and marked "Exhibit B." Your complainant further avers that during this time, and about January 2, 1888, the Kansas City, Wyandotte & Northwestern Railroad Company executed and delivered to the Farmers' Loan & Trust Company of New York a deed of trust, or mortgage, on its said railroad, right of way, tracks, equipments and franchises, that is, such of its said railroad, right of way, tracks, improvements, equipments and franchises as it owned, and had paid for and acquired at the time of the execution of said deed of trust, or mortgage.

9. And your complainant further avers that at the

time of the execution and delivery of said deed of trust, or mortgage, to said Farmers' Loan & Trust Company of New York, the said Kansas City, Wyandotte & Northwestern Railroad Company had not acquired the title to the right of way over the land and the street immediately in front of said premises appropriated as aforesaid, and had not compensated said property owner for the damages sustained by him as aforesaid, and that at the time of the execution of said deed of trust, or mortgage, the said Kansas City, Wyandotte & Northwestern Railroad Company had no title to said right of way, and could not give any lien thereon that was prior and paramount to the claim and lien of said L. Zimmerman, for compensation for the land appropriated and damages sustained by him as above stated, and that the said Farmers' Loan & Trust Company did not, under and by virtue of their deed of trust, or mortgage, acquire any lien, right or title that is prior to the lien, claim and right of said plaintiff, to be compensated for his land appropriated and the damages sustained by him as above stated.

10. Your complainant further avers that on or about March 31st, 1890, the said Farmers' Loan & Trust Company of New York commenced its action in the Circuit Court of the United States for the District of Kansas, to foreclose its said deed of trust, or mortgage, and that on or about the 18th day of June, 1893, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company, foreclosing said deed of trust, or mortgage, and ordering that said property, described in said deed of trust or mortgage be sold, unless, within some short time thereafter in said decree mentioned, said railroad company, or some person or persons for it, should pay the amount of said mortgage indebtedness, with the expenses and costs thereof; that thereafter and on or about the —

day of ——, 1894, said property was sold to George C. Smith and B. P. Waggener, who were the agents and purchasing trustees for the said defendant Company.

11. Your complainant further avers that after making of said sale, the Master making the same duly made his report thereon, and on the 9th day of April, 1894, upon the consideration of such report, said sale was confirmed by said court and which said order of confirmation, among other matters, contained the followiing provision:

"And said master commissioner is ordered and directed to make the purchasers at said sale, to-wit, George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report to such purchasers, said report being confirmed, however, subject to the provisions of said original decree, and subject to the provisions to be contained in the deed executed by said master commissioner to said purchasers."

12. Your complainant further avers that afterwards, and in consummation of said sale, a deed was executed by the master to said George C. Smith and B. P. Waggener, the purchasers at said sale, conveying to them the premises mentioned in said foreclosure decree, which deed was on the 18th day of June, 1894, approved by the court subject to certain conditions set forth in the order of approval, which order was written, or a part thereof, upon the original deed, and is in the following words and figures.

"The foregoing deed examined and approved subject to the condition that the purchaser take the property subject to all orders of the court relating to the payment of the debts of the company, and the receiver, and said property shall remain liable for such debts, if any there are remaining unpaid."

HENRY C. CALDWELL,
U. S. Circuit Judge.

which deed was thereupon entered upon the records in the office of the Register of Deeds of Leavenworth County, Kansas, and thereafter said George C. Smith and B. P. Waggener conveyed said property to the defendant, The Kansas City, Northwestern Railroad Company, for whom they were acting as Trustees, and your complainant further avers that said company has no right, title or interest in or to such property save and except as it acquired by said conveyance.

13. Your complainant further avers that said B. P. Waggener, one of the purchasing Trustees at such foreclosure sale, was at the time of the beginning of the foreclosure proceedings mentioned above, and at the time of purchasing the property at such sale, the general attorney and counsellor for the Kansas City, Wyandotte & Northwestern Railroad Company, and was one of the attorneys of record for the defendant in the action in which said L. Zimmerman, now deceased, recovered judgment against the Kansas City, Wyandotte & Northwestern Railroad Company, as mentioned above, and at the execution and approval of the deed conveying to the said trustees said premises and the deed to said defendant, was still such attorney, and had actual knowledge of the pendency of said action in the District Court of Leavenworth County, Kansas, and of the nature and extent thereof, and what was claimed by said plaintiff in said action, and well knew that said plaintiff had not been compensated for his land appropriated and the damages sustained by him in such appropriation, and the construction of such embankment, and the changing of the established grade of such street immediately in front of said premises, and said trustees, nor said defendant company, are not innocent purchasers of said right of way, etc., for value, they at all times having knowledge and notice of said plaintiffs' claims.

14. Your complainant further avers that he is the representative of judgment creditor of the Kansas City, Wyandotte & Northwestern Railroad Company, and one of the persons in whose favor the reservation and provision as embodied in the orders, decrees, judgments, orders of confirmation and deed mentioned aforesaid, and said orders, decrees, judgments, order of confirmation, and deed are records of this court, and complainant refers to them and prays that he may use them as part hereof, or so much thereof as is deemed pertinent to the issues herein, as if they had been fully set out.

15. Your complainant further avers that on this 17th day of November, 1886, the aforesaid Leavenworth & Olathe Railroad Company procured the Mayor and Council of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the City of Leavenworth, and that in said ordinance said Leavenworth and Olathe Railroad Company was granted the right to cross Second Street at some point south of the north line of Maple Street; also over the south levee, Front street, and the south Esplanade, from the south line of Fackler's Addition to the north line of Spruce, etc., and that as a condition for the grant and privilege mentioned in said ordinance, it was provided that in all such cases "where the grade of any street or public ground is changed by said company or its successors, it shall protect the City from cost and damage at the suits of the property owners;" all of which will more fully appear by a true copy of said ordinance hereto attached and made a part hereof and marked "Exhibit C."

16. Your complainant further avers that on or about the 19th day of January, 1887, said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance;

and that in and by the articles of consolidation mentioned aforesaid, The Kansas City, Wyandotte & Northwestern Railroad Company assumed, accepted and agreed to all the terms, obligations and conditions of said ordinance and that under and by virtue of taking possession of said railroad and its tracks, and continuing to operate the same over said plaintiff's premises appropriated and taken as aforesaid, the decree of foreclosure and the purchase aforesaid, and of accepting and operating said railroad under and by virtue of the ordinance of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, The Kansas City Northwestern Railroad Company, has become liable to said plaintiff for the amount of said judgment, with interests and costs.

17. Your complainant further avers that long before the above judgment was obtained all the property of the Kansas City, Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, The Kansas City Northwestern Railroad Company, and that under and by virtue of taking possession of the right of way and operating its trains and cars over the land appropriated and across said street immediately in front of said premises, and continuing to keep possession and operating its trains thereon, and of said decrees and the ordinances of the said city, said defendant, The Kansas City Northwestern Railroad Company, has assumed and become obligated to pay off any and all obligations of the said Kansas City, Wyandotte & Northwestern Railroad Company to said plaintiff for its right of way, and that under and by virtue thereof, the Kansas City, Wyandotte & Northwestern Railroad Company has turned over to said defendant railroad company all of its property rights and

franchises, and has no property of any kind or description subject to execution, and has refused to pay any part or portion of said judgment, and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company, and that the said Kansas City, Wyandotte & Northwestern Railroad Company, and defendant, Kansas City Northwestern Railroad Company, neglect and refuse to pay the aforesaid judgment or any part thereof, although often thereunto requested.

In consideration whereof and for as much as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly recognizable and reviewable:

To The End, Therefore, that your orator may have that relief which he can only obtain in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit of which is expressly waived by your orator, now prays the court that a decree be rendered against the defendant, the Kansas City Northwestern Railroad Company, for the sum of Three Thousand Dollars ($3,000.00), with interest thereon at the rate of six per cent. per annum from the 15th day of May, 1897, until paid, and for costs of suit, and your complainant further prays that said defendant, The Kansas City, Northwestern Railroad Company, be required to pay the amount aforesaid, within some short time to be mentioned in said decree, and that if it fails to so do, that a Receiver be appointed to take charge of its property, railroad cars, franchises, equipments, etc., and to manage, collect and run same under the order of the court, until sufficient funds have been collected to pay said amount, with interest thereon as aforesaid, or that it be permanently enjoined and restrained from operat-

ing its said railroad over that part or portion of plaintiff's land appropriated as aforesaid, and from operating and maintaining said embankment across said Second street in front of said plaintiff's property until it pays, or some person or persons for them, the aforesaid mentioned amount, and compensate said plaintiff for the damage and property taken by the aforesaid mentioned railroad company, and which obligations the said defendant in its purchase, and otherwise, assumed, and that if it is found in determining and adjudicating the rights of the parties hereto that other persons, parties, or corporations, have some interest herein and that they are necessary parties to a complete adjudication and decision of the matters hereof, that they be brought into court and made parties defendant, and be required to set up their claim, if any, and have all their rights and interests in the premises adjudicated and that they be declared junior and inferior to the rights, claims and demands of the plaintiff herein, and for all such other and further relief, as in equity and good conscience the plaintiff may be entitled to in the premises.

WILLIAM W. HOOPER,
Solicitor for Plaintiff.

JNO. H. ATWOOD,
Of Counsel.

To the end that your orator may obtain the relief to which he is justly entitled in the premises, he now prays the court to grant him due process by subpœna directed to the Kansas City Northwestern Railroad Company, defendant hereinbefore named, requiring and commanding it to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this your orator's bill of complaint contained.

——— ———,
Solicitor for Plaintiff.

——— ———,
Of Counsel.

UNITED STATES OF AMERICA, *District of Kansas, ss*:

On this 8th day of May, 1901, before me personally appeared Frederick Zimmerman, the above named plaintiff, who made solemn oath that he read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

FREDERICK ZIMMERMAN.

Subscribed and sworn to before me this 8th day of May, 1901.

[SEAL.] J. H. ATWOOD, JR.,
Notary Public.

My Commission expires Dec. 26th, 1904.

"EXHIBIT A."

UNITED STATES OF AMERICA:

Be It Remembered, That at the April Term A. D. 1897 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said state, begun and held in the City of Leavenworth, commencing on Monday, the 19th day of April A. D. 1897. Present the honorable Louis A. Myers, Judge, J. H. Rothenberger, Sheriff of Leavenworth County, Kansas, and James Gray, Clerk; the following proceedings were had to-wit:

SATURDAY, *May 15th, A. D.* 1897.

Court met pursuant to adjournment.

Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,

against

THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

Now on this 15th day of May A. D. 1897, and during the regular April Term of the District Court of Leavenworth county, Kansas, came on for hearing the defendant's motion for a new trial in the above entitled action; the plaintiff being present by his attorneys, Baker, Hook & Atwood, and the defendant by its attorneys, W. P. Waggener and C. F. W. Dassler, and the matters and things having been submitted to the court, and after arguments of counsel, the said motion for a new trial is overruled, defendant excepting, and thereupon it is ordered, adjudged and decreed that the said plaintiff do have and recover judgment of and from said defendant for the sum of Three thousand ($3000.00) Dollars and for $— costs of suit, and that execution issue therefor.

On application of the defendant the time within which to make and serve a case-made for the Supreme court is hereby extended ninety (90) days from this date, and the plaintiff is allowed 20 days thereafter in which to suggest amendments, and the same to be settled on five days' notice by either party.

"Exhibit B."

United States of America:

Be It Remembered, That at the April Term A. D. 1898, of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the city of Leavenworth, commencing on Monday the 18th day of April A. D. 1898. Present the honorable Louis A. Myers, Judge, Peter Everhardy, Sheriff of Leavenworth County, Kansas, and James Gray, Clerk; the following proceedings were had, to-wit:

SATURDAY, *May 7th, A. D.* 1898.

Court met pursuant to adjournment
Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

And now on this 7th day of May A. D. 1898, comes Fred Zimmerman, Administrator of the estate of L. Zimmerman, deceased, by Baker, Hook & Atwood, his attorneys, and thereupon came on for hearing the motion of the said administrator heretofore filed herein to revive, in the name of Fred Zimmerman, as administrator of the estate of L. Zimmerman, deceased, this action and the judgment heretofore rendered in this action, on May 15th, 1897, in favor of the plaintiff, L. Zimmerman, and against the defendant, The Kansas City Wyandotte and N. W. R. R. Co.; and it appearing to the court that the defendant herein has been duly and legally served with a notice of said motion, and that they failed to appear either in person or by an attorney, or to show any cause why said motion should not be sustained.

It is therefore now by the court considered, ordered and adjudged that Fred Zimmerman, as Administrator of the estate of L. Zimmerman, deceased, be and he is hereby substituted as plaintiff herein with all the rights of the said plaintiff, and that this action and the orders and judgment rendered herein stand revived and hereafter proceed in the name of the said Fred Zimmerman, as Administrator of the estate of L. Zimmerman, deceased, and that he as such administrator have and recover of and from said defendant herein the sum of $3000.00 with interest thereon at the rate

of 6% per annum from the 15th day of May 1897 until paid and also the costs in this suit, and that execution issue therefor.

STATE OF KANSAS, *Leavenworth County, ss*:

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be — true, full and complete copy of The Journal Entry of the order of Court reviving this action and judgment in name of Fred Zimmerman, as administrator of the estate of L. Zimmerman, in the therein entitled cause, as the same remains of record in my office.

Witness my hand, and the seal of said court affixed at my office in the City of Leavenworth, this the 24th day of May A. D. 1899.

[SEAL.]

JAMES GRAY, *Clerk*,
By J. H. KIRMEYER,
Deputy Clerk.

"EXHIBIT C."

Ordinance No. 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth and Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:

SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company, for a period of 20 years from and after the passage of this ordinance, over and upon the following streets and public grounds of the City of Leavenworth, to-wit: Across Limit Street on the southern boundary of the city; also across Second street at some point south of the

north line of Maple street; also over the south Levee, Front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street, and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth and Olathe Railroad company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said right of way, such company or companies to pay the Leavenworth & Olathe Railroad company a proportionate amount of the costs of the construction and maintenance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use to be determined by representatives, one to be selected by each company, and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad Company neglects to name its representative, then the mayor and council of this city shall designate another arbitrator, who shall act with the others in determining the points of difference. Said Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same, and when practicable shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from

cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same, shall be determined by the engineer of said company and the city engineer, and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance, all rights under this ordinance shall be forfeited without further action on the part of the city. Provided That if said company shall be delayed in the construction of its said road in the city of Leavenworth by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have, within which to construct its said track, one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall, by writing, accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD,
City Clerk.

Passed November 17th A. D. 1886.
Published November 18th A. D. 1886.

To which amended complaint the defendant, The Kan-

sas City Northwestern Railroad Company, filed its amended demurrer (Trans. of Rec., pp. 44-46), and the same was considered in connection with a motion of complainant to remand the case to the State Court. The motion to remand was overruled and denied, and the amended demurrer to the amended complaint was sustained (Trans. of Rec., pp. 47-48); and, judgment being entered for the defendant railroad company, the complainant prosecuted his appeal to the Circuit Court of Appeals—which court, on March 3d, 1906, reversed the judgment of the Circuit Court sustaining said demurrer, without the question of jurisdiction being raised.

The Circuit Court of Appeals, in 144 Fed. Rep., p. 624, said:

"Notwithstanding all the parties are citizens of Kansas, it is practically, and, we think, necessarily, conceded that the court below quired jurisdiction, on the ground that the suit, as origi. ly brought, involved the construction of the decree of the Federal Court in the foreclosure suit. We, accordingly, refrain from further considering the jurisdictional question, raised by the assignment of error."

And decided the controversy upon the merits; and, when the mandate of the Circuit Court of Appeals was entered, the defendant was given thirty days to elect as to whether or not it would stand upon its demurrer, and have final judgment rendered against it thereon, or whether it would elect to answer, and, in the event it elected to answer, time

was given in which so to do. (Trans. of Rec., pp. 50-51.)

The defendant elected to stand on its demurrer, and, thereupon, the court entered a decree *pro confesso*, giving judgment in favor of the plaintiff in error, against the defendant in error, and made a decree accordingly. (Trans. of Rec., pp. 53-56.)

The defendant filed its assignments of error, and prosecutes its appeal to this court for the purpose of securing a reversal of the judgment of the court below.

ASSIGNMENTS OF ERROR.

I.

That the Circuit Court of the United States, for the District of Kansas, First Division, erred in overruling the demurrer, interposed by the defendant, to the bill of complaint filed in this cause, and by holding and deciding, under the matters and things stated in said bill, it had jurisdiction

of said cause and jurisdiction to grant the relief praved for in said bill.

II.

That the Circuit Court of the United States, for the District of Kansas, First Division, erred in rendering final decree against defendant, on the bill filed herein, and rendering judgment against defendant for costs.

III.

Wherefore, in order that the foregoing assignments of error may be and appear of record, the defendant presents the case to the court, and prays that some disposition may be made thereof, in accordance with the law and statutes of the United States in such cases, and complainant prays a reversal of the decretal order and decree of final judgment, made and entered by said court.

ARGUMENT AND BRIEF.

THE CAUSE WAS IMPROPERLY REMOVED FROM THE STATE COURT TO THE CIRCUIT COURT.

The record does not present a case of diverse citizenship. The petition for removal was prepared upon the theory that the provisions of Section 709 of the Revised Statutes applied to and controlled the right of removal to the same extent as it authorized a review by this court of the decisions of the highest courts of the states, in suits "where any title, right, privilege or immunity is claimed, under the constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege or immunity specially set up, or claimed by either, under such constitution, treaty, statute, commission or authority."

This erroneous theory is clearly pointed out by this court in the case of *Carson* v. *Dunham*, 121 U. S., 427-428. The fact that the defendant, in the State Court, secured a removal of the cause to the Circuit Court, upon a mistaken view of the law, could not give the Circuit Court jurisdiction, and the judgment rendered should be vacated and set aside, if it affirmatively appears that the cause was improperly removed.

Ry. Co. v. *Swan*, 111 U. S., 382-385;

Wabash R. R. Co. v. *Barbour*, 73 Fed. (C. C. A.), 513-514.

In the case of *Chappel* v. *Waterworth*, 155 U. S., 102, it was said that a case not depending on the citizenship of the parties, or otherwise provided for, "cannot be removed from a state court into the Circuit Court of the United States, as one arising under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; *and if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in the subsequent pleadings.*"

See also:

Postal Tel. Co. v. *Alabama*, 155 U. S., 487;
Arkansas v. *Kan., etc., R. R. Co.*, 183 U. S., 185;
Boston, etc. v. *Montana, etc.*, 188 U. S., 639.

In the case of *Defiance Water Co.* v. *Defiance*, 191 U. S., 185, is was said that:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which result depends, it is not a suit arising under the constitution or laws; *and it must appear on the record, by a statement in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as*

to a right, which depends on the construction of the constitution, or some law or treaty of the United States, before jurisdiction can be maintained on that ground."

Newburyport Water Co. v. *Newburyport*, 193 U. S., 576.

Did the petition (Trans., pp. 2-6), filed in the State Court, present a cause of action which involved a dispute or controversy "as to the effect or construction of the constitution or laws of the United States"? If it did not, the Circuit Court acquired no jurisdiction, and, within the rule announced by this court in the case of *Defiance Water Co.* v. *Defiance*, 191 U. S., 194, the judgment of the court below should be reversed. In that case it was said that:

"The fundamental question of jurisdiction, first, of this court ,and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not.

Mansfield, C. & L. M. R. Co. v. *Swan*, 111 U. S., 379, 382; 28 L. Ed., 462, 464; 4 Sup. Ct. Rep., 510;

Metcalf v. *Watertown*, 128 U. S., 586; 32 L. Ed., 543; 9 Sup. Ct. Rep., 173;

Morris v. *Gilmer*, 129 U. S., 315; 32 L. Ed., 690; 9 Sup. Ct. Rep., 289;

Continental Nat. Bank v. *Buford*, 191 U. S., 119; *ante*, 119; 24 Sup. Ct. Rep., 54.

The Circuit Court, having maintained jurisdiction on the ground that the case arose under the constitution of

the United States, and, having proceeded to decree, the appeal was properly brought directly to this court, and it at once became our duty to inquire whether the Circuit Court should have retained the case. Having reached the result that the court erred in so doing, we are vested with the power to direct that conclusion to be carried into effect, and in its exercise we discharge one of our essential functions—the determination of the jurisdiction of the courts below.

Morris v. *Gilmer*, 129 U. S., 315; 32 L. Ed., 690;
Wetmore v. *Rymer*, 169 U. S., 115; 42 L. Ed., 682; 18 Sup. Ct. Rep., 293;
Aztec Min. Co. v. *Ripley*, 151 U. S., 79; 38 L. Ed., 80; 14 Sup. Ct. Rep., 236."

See *Newburyport Water Co.* v. *Newburyport*, 193 U. S., 576.

The only foundation for the claim that the suit involved a construction of the constitution and laws of the United States is the averment in the petition (Trans., p. 4), that, on or about March, 1891, the Farmers' Loan & Trust Company brought an action in the Circuit Court of the United States, for the District of Kansas, to foreclose a mortgage executed by the Kansas City, Wyandotte & Northwestern Railroad Company, and a decree of foreclosure was entered, and that thereafter, the said "railroad company, and all of its equipment, etc.," "were sold to the defendant, The Kansas City, Wyandotte & Northwestern Railroad Company, and that said defendant became the successor in interest to all the rights, franchises and privileges of said Kansas City, Wyandotte & Northwestern Railroad

Company, and, *as part consideration*, assumed and was subject to all of the liabilities of the * * * Kansas City, Wyandotte & Northwestern Railroad, under and by virtue of said decree and purchase."

Again (Trans., p. 5), that, "under and by virtue of the decree of foreclosure and the purchase aforesaid, and of accepting and operating said railroad under and by virtue of the ordinance of said city, and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners, by reason of the construction of the railroad aforesaid, said defendant, The Kansas City & Northwestern Railroad Company, has become liable to said plaintiff for the amount of said judgment, with interest and costs."

Again (Trans., p. 5), that, "under and by virtue of said decree and the ordinances of said city, said defendant, Kansas City & Northwestern Railroad Company, *assumed* and *agreed* to pay off any and all obligations of the Kansas City, Wyandotte & Northwestern Railroad Company, etc."

There is no claim made in the petition that defendant, The Kansas City Northwestern Railroad Company, was a party to the decree, but its liability for the judgment against the Kansas City, Wyandotte & Northwestern Railroad Company, is based upon the sole ground that it

became the purchaser, under the decree of foreclosure, and, *thereby* the successor in interest of the Kansas City, Wyandotte & Northwestern Railroad Company, and assumed and *agreed* to pay any and all obligatiins of the Kansas City, Wyandotte & Northwestern Railroad Company," etc.

It is not alleged or claimed in the petition that the decree fixed any such liability, but the cause of action attempted to be stated is that, because of the fact that the Kansas City & Northwestern Railroad Company purchased all the property, rights, franchises and privileges of the Wyandotte Company, under the decree of foreclosure of a mortgage, of date January, 1888, it became liable for all of the unsecured obligations of the Wyandotte Company, which accrued subsequent to the date of the mortgage, and that it "*assumed* and *agreed*" to pay the same.

If such statement of facts discloses a controversy which involved a construction of the constitution and laws of the United States, the suit was properly removed to the Circuit Court; otherwise not.

In the case of *Provident Saving Society* v. *Ford*, 114 U. S., 635, it was said that:

"The fact that a judgment was recovered in a court of the United States, does not, in a suit upon the judgment, raise a question, under the laws of the United States, within the meaning of the act of March 3d, 1875."

If a suit on a judgment of a United States Circuit Court does not involve a construction of the constitution and laws of the United States, can it be successfully contended that a mere reference to such a judgment, without basing any right thereon, involves such a construction as would have given the Circuit Court jurisdiction, had the suit been originally brought in that court?

In the case of *Mexican R. R.* v. *Davidson*, 157 U. S., 208, it was said that:

"The jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. *The question is a question of jurisdiction, and cannot be waived.*"

Tennessee v. *Union Bank*, 152 U. S., 454, 460;

Ex-parte, Wisner, 203 U. S., 449.

Recurring to the petition—

In the case of *Leather Mfg. Bk.* v. *Cooper*, 120 U. S., 778, it was held that:

"A case does not arise under the laws of the United States simply because this court has decided in another suit the questions of law which are involved."

Swearinger v. *St. Louis*, 185 U. S., 44.

The decision of this court, cited *supra* (*Provident Sav.*

Society v. *Ford*, 114 U. S., 635), was quoted approvingly in the cases of

Carson v. *Dunham*, 121 U. S., 427-428;

Rand v. *Walker*, 117 U. S., 340.

The question whether or not a Federal question was involved must, under many decisions of this court, be determined from the plaintiff's own statement of his case, and, "if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal, or the subsequent pleadings, or by taking judicial notice of facts not relied on regularly brought into the controversy"—as was decided by this court, in the case of *Arkansas* v. *K. & T. Coal Co.*, 183 U. S., 185.

It is not alleged in the petition filed in the State Court that the judgment and decree of the Circuit Court involved any construction of the constitution and laws of the United States. On the contrary, it affirmatively appears that the suit in the Circuit Court was an ordinary foreclosure proceeding, and the judgment an ordinary decree, under which a sale of the mortgaged property was had, and the defendant became the purchaser. It does not appear from said petition that there was or could be any controversy between the plaintiff and defendant as to the validity of the decree. On the contrary, sufficient appears from the petition to justify the conclusion that the controversy was one of

fact and law, which did not and could not involve or make necessary a construction of the constitution or any law of the United States.

In the case of *Metcalf* v. *Watertown*, 128 U. S., 586, it was held that:

"The fact that a suit is brought to recover the amount of a judgment of a court of the United States, does not, of itself, make it a suit arising under the constitution and laws of the United States."

In the case of *Joy* v. *St. Louis*, 201 U. S., 340, it was said that:

"It is a long settled rule, evidenced by many decisions of this court, that the plaintiff cannot make out a case as arising under the constitution or the laws of the United States, unless it necessarily appears by the complaint or petition or bill, in stating plaintiff's cause of action."

In the case of *Leather Mfg. Bank* v. *Cooper*, 120 U. S., 781, it was said that:

"A suggestion was made in the argument that the case is one arising under the laws of the United States, for the reason that the cause of action is identical with that sued on in *Leather Manufacturers Bank* v. *Morgan*, 117 U. S., 96, decided by this court at the last term, and in which the principles of law which govern the right of the parties were determined. Nothing of the kind, however, appears in the record, *and, if it did, it would not authorize a removal. This is not that suit, and a case does not arise under the laws of*

the United States simply because this court, or any other Federal court, has decided in another suit the questions of law which are involved."

THE CIRCUIT COURT DID NOT HAVE ANY JURISDICTION TO GRANT THE RELIEF PRAYED FOR UNDER THE AMENDED BILL OF COMPLAINT, FILED IN THAT COURT AFTER THE REMOVAL FROM THE STATE COURT.

After the case was removed to the Circuit Court, the plaintiff filed an amended complaint (Trans., pp. 31-37), in which certain portions of the decree were set forth—in which, among other things, it was provided that the sale was confirmed "subject to the provisions of said original decree, and subject to the provisions to be contained in the deed, executed by said Master Commissioner, to said purchaser" (Trans., p. 34); and a copy of the endorsement on the deed, as follows, viz.:

"The foregoing deed examined and approved, subject

to all orders of the court, relating to the payment of the debts of the Company, and the Receiver, and said property shall remain liable for such debts, if any there are, remaining unpaid.

HENRY C. CALDWELL,
U. S. Circuit Judge."

(Trans., pp. 34-35.)

To this amended complaint, defendant filed a demurrer (Trans., pp. 44-46), which was sustained by the Circuit Court (Trans., pp. 47-48), and its opinion copies from the original decree as follows, viz.:

"This court hereby reserves to itself from this decree the power and jurisdiction, both as against the parties to this suit and as against said purchaser, at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the Receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid, and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees, touching said claims and demands, as may be deemed proper, etc."

This decision of the Circuit Court was reversed by the Circuit Court of Appeals, on appeal taken thereto by the complainant. (See 144 Fed. Rep., pp. 623-627.)

It will be observed that the Circuit Court of Appeals decided the case upon the constitution of the State of Kansas, which provides (Art. 12, Sec. 4) that:

"No right of way shall be appropriated to the use of

any corporation until full compensation therefor be first made in money, or secured by a deposit of money."

(It may be observed that, by repeated decisions of the Supreme Court of Kansas, this section of the constitution has been construed to apply only to a right of way over property owned by an individual, and not to damages to an abutting owner, on account of obstructions to the ingress to and egress from his property, by reason of the construction of railway tracks over a street, which right is given by express statute. Sub. fourth, Sec. 1316, Genl. Stat. of Kan., 1901, p. 297.)

The decision of the Circuit Court of Appeals shows conclusively that the controversy did not involve a construction of the constitution of the United States, or any law of the United States. When the case was remanded to the Circuit Court, the defendant elected to stand on its demurrer, and a decree *pro confesso* was taken, in which the court finds that the suit instituted in the State Court was "duly removed" to the Circuit Court, and made the finding that:

"13½. The court further finds that one of the conditions in the said foreclosure decree was as follows:

'This court hereby reserves to itself from this decree the power and jurisdiction, both as against the parties to this suit, and as against said purchaser, at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the Re-

ceiver or the mortgagor company, before the commencement of this suit, and to determine as to said claims whether they are or are not valid, and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper.'

And that a condition off the order of confirmation of said foreclosure sale was as follows:

'And said Master Commissioner is ordered and directed to make to the purchasers at said sale, to-wit: George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report to said purchasers—said report being confirmed, however, subject to the provisions of said original decree and subject to the provisions to be contained in the deed executed by said Master Commissioner to said purchaser.'

And that the following order was endorsed on the purchasers' deed:

'The foregoing deed examined and approved, subject to the condition that the purchaser take the property subject to all the orders of the court, relating to the payment of the debts of the company, and the Receiver, and said property shall remain liable for such debts, if any there are remaining unpaid.'

HENRY C. CALDWELL,
U. S. Circuit Judge."

The defendant filed its assignments of error (Trans., p. 57) and an appeal was allowed (Trans., p. 58), and the question of jurisdiction duly certified to this court.

We submit that the foreclosure decree, as made by the Circuit Court (Trans., p. 55), clearly shows that the Dis-

trict Court of Leavenworth County had no jurisdiction to either enforce the judgment in the suit against the assignee of the purchaser, under such decree, or to determine the validity or extent of the judgment against the Wyandotte Company, or to establishe such judgment as a lien on the property purchased under the decree, superior to the mortgage liens therein foreclosed, and that, by the removal, if properly removed, from the State Court, the Circuit Court only acquired such jurisdiction and power to determine, as the State Court possessed and might have exercised had there been no removal.

It will be conceded, we think, that the Circuit Court acquired *exclusive* jurisdiction of the foreclosure proceedings in the case of the Farmers' Loan & Trust Company against the Kansas City, Wyandotte & Northwestern Railroad Company, long prior to the institution by Zimmerman of his action in the State Court, and, in the decree (Trans., p. 47), reserved the power and jurisdiction, both as against the parties to the suit, and as against the purchaser, to *hear* and *adjudicate* all pending and undetermined claims against the mortgagor company, before the commencement of the suit.

It seems to be well settled by decisions of this court that the jurisdiction having first attached in the Circuit Court, it retains it *exclusively*, and will be left to determine

the controversy, and to fully perform and exhaust its jurisdiction, and to decide every issue or question properly arising in the case, and that such jurisdiction cannot be divested or arrested by subsequent proceedings in another court.

Harkrader v. *Wadley*, 172 U. S., 148;

In-Re Chatwood, 165 U. S., 443.

In the foreclosure suit, the court took possession of the property of the mortgagor, and, for the purposes mentioned in the decree, reserved and retained jurisdiction over the parties as well as the property.

In the case of *Farmers' Loan & Trust Co.* v. *Railroad Co.*, 154 U. S., 51, this court held that such jurisdiction was exclusive, and disabled "other courts of co-ordinate jurisdiction from exercising a like power."

Clearly, therefore, the State Court, from which the cause was removed, had no power or jurisdiction to grant the relief prayed for in the original petition, or on the facts as disclosed by the amended complaint.

In the case of *E. Tenn. Va. & Ga. R. R.* v. *South Tel. Co.*, 112 U. S., 310, the principle was announced that the courts of the United States, on removal of a suit from a state court, are "clothed with no greater power in the premises than the courts of the state would have possessed if their jurisdiction had been preserved."

Randall v. *Howard*, 2 Black (U. S.), 589.

Can it be successfully contended that the state court, on the facts found by the court below (Trans., pp. 53-54), would have had jurisdiction to fasten a lien upon the property covered by the foreclosure proceedings, which property, by the very terms of the decree, was in the custody of the Federal Court? Could Zimmerman, as an unsecured creditor, derive any benefit from or base any proceeding in the state court upon the decee of the Circuit Court when, by the terms of the decree, exclusive jurisdiction was retained in that court? But for the decree, on the conceded facts, he would have had no status in any court. That decree gave him a status *only* in the court which made the decree, reserving exclusive jurisdiction. Could he, therefore, ignore the conditions of the decree, and, by the institution of an independent suit in the state court, give that court jurisdiction and power to divest the Circuit Court of its exclusive jurisdiction under the decree? The reservation in the decree is valid as an entirety, or void *in toto*.

We understand the rule to be as announced in the case of *Swift* v. *Railroad Co.*, 58 Fed., 861, that:

"The courts of the United States, upon removed cases, have no wider jurisdiction than the courts of the states from which they were removed. The removal simply transfers the hearing from the state court to the national tribunal, but does not enlarge the right of the court to hear the cause."

Under the reservations in the decree, the question as to the complainant's right under that decree was a matter of primary as well as exclusive jurisdiction in the Circuit Court which made the decree, and could not be invoked in the state court.

Barrow v. *Hunton*, 99 U. S., 80-85.

If we correctly understand the decision of this court in the case of *Minnesota Co.* v. *St. Paul, etc.*, 2 Wal., 609, it is decisive of this case. The court said (p. 633):

"An unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected, and to carry into effect the real intention and decree of the court, and that while the property which is the subject of contest is still within the control of the court, and subject to its order."

And the court further said (p. 632):

"The present suit is really a continuation of that one. The rights of the parties depend upon the construction which is placed upon the acts of the court in it; and the present bill is necessary in order to have a declaration of what was intended by the orders and decrees made in that suit, and to enforce the rights which were established by it."

The only difference between the case cited *supra* and the case at bar is that in the Minnesota case the complainant was a party to the original foreclosure, while the com-

plainant Zimmerman was not a party to the foreclosure proceedings in the case of the *Farmers' Loan & Trust Co.* v. *Wyandotte Company*, in which the decree was made, and hence his rights under the decree, if any he had, could only have been enforced by intervention in that case. The Circuit Court would have had no original jurisdiction because the requisite diverse citizenship did not exist, and the averments of neither his petition in the state court nor in his amended complaint show that a construction of the Constitution of any law of the United States was involved.

It appears by the petition filed in the state court that, in the foreclosure suit in the Circuit Court, that court had no jurisdiction of the parties to the action in the state court, and no jurisdiction of the subject matter, and, by the amended complaint, that the Circuit Court, by the reservation of the decree, retained jurisdiction of the parties and the subject matter. The decree of foreclosure was entered on the 18th day of January, 1893, (Trans., p. 54), and this action was commenced in the state court on the 21st day of May, 1899. (Trans., p. 55.)

Randall v. *Howard*, 2 Black (U. S.), 589.

The amended complaint on which the decree was entered did not state a case under the Constitution or laws of the United States. It seems to us that this contention is settled by the decision of this court in the case of *Rand*

v. *Walker*, 117 U. S., 340-345. At page 345 the court said:

"After the suit got into the Circuit Court, a supplemental bill was filed by Mrs. Walker, in which she alleged that a certain judgment which had been obtained in the Circuit Court of the United States after removal, in a suit to which she was not a party, had been obtained by collusion between the parties thereto, and did not conclude her upon certain questions arising under the deed of trust to Brown. This, it is claimed, gave the Circuit Court jurisdiction independent of any removal, on the ground that thereafter the suit was one arising under the Constitution and laws of the United States, within the meaning of the act of 1875. To this we cannot agree. The effort of Mrs. Walker is not to avoid the judgment as between the parties, but to show that, as to her, she not being a party, it has no effect. This raises no question under the authority of the United States."

From the foregoing decisions of this court, it would seem to be settled that if the state court had no jurisdiction to grant the relief prayed for, the Circuit Court, by the removal, acquired no such jurisdiction, and that the decree of the Circuit Court should for that reason be reversed.

In the case of *Newburyport Water Co.* v. *Newburyport*, 193 U. S., 575, it was said that:

"At the threshold we are met with the objection, raised below and urged at bar, that the Circuit Court was without jurisdiction, because the bill on its face did not state a case arising under the Constitution or laws of the United States.

within the intendment of the act of August 13th, 1888, 25 Stat. at L., 433, chap. 866, (U. S. Comp. St. 1901, p. 508). As the case is here on direct appeal from the decree of the Circuit Court of the United States, the solution of this question necessarily involves also deciding whether the cause was properly brought to this court. As the existence of the constitutional question is the only basis of the right to the direct appeal, if there was no such question in the court below there was and is no such issue by which the direct appeal to this court can be sustained. Under these circumstances, if the contention as to want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, our duty is not simply to dismiss the appeal, but to reverse the decree below, with instructions to the Circuit Court to dismiss the bill for want of jurisdiction. *Defiance Water Co. v. Defiance*, 191 U. S., 184."

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS NOT FINAL, AND THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL.

After the pleadings were recast in the Circuit Court, the complainant filed the following motion to remand the

case to the District Court of Leavenworth county, viz. (Trans., p. 46.):

"Now comes the above named plaintiff, and moves the court to remand this case to the District Court of Leavenworth county, Kansas, for the reason that this court has no jurisdiction to hear or try the same.

JOHN H. ATWOOD, and
WILLIAM W. HOOPER,
Attorneys for Complainant."

This motion was overruled by the Circuit Court. (Trans., p. 48.) After the demurrer was sustained by the Circuit Court, the complainant appealed to the Circuit Court of Appeals, and, among other things, assigned as error (Trans., p. 62.):

"That the court erred in not sustaining complainant's motion to remand said cause to the District Court of Leavenworth county, Kansas, from whence it had come on removal at the instance of the defendant herein."

The Circuit Court of Appeals said:

"Notwithstanding all the parties are citizens of Kansas, it is practically and we think necessarily conceded that the court below acquired jurisdiction, on the ground that the suit, as originally brought, involved the construction of the decree of the Federal Court in the foreclosure suit. We accordingly refrain from further considering the jurisdictional question raised by the assignment of error."

In the final decree (Trans., p. 55) the Circuit Court found that "said case was duly removed to this court, etc."

It will thus be seen that each side was uncertain as to the jurisdiction of the court.

It is now claimed that the case has been improperly appealed to this court, but that question is put at rest by section 5, (26 Stat., 826), March 3rd, 1891, which provides that:

"Appeals or writs of error may be taken from * * * the existing Circuit Courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue."

In the case of *Northern Pacific Ry.* v. *Soderberg*, 188 U. S., 528, it was said that:

"To impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was dependent entirely' upon diverse citizenship."

We respectfully submit that the judgment of the court below should be reversed, for the reason that the case was improperly removed from the state court, and for the reason that the state court had no jurisdiction of the subject matter of the action, and that, on the removal, if properly made, the Circuit Court acquired only the jurisdiction of the state court, and, therefore, had no jurisdiction to grant the relief prayed for.

BALIE PEYTON WAGGENER,

Attorney for Appellant.

(20,574.)

Supreme Court of the United States.

OCTOBER TERM, 1907.

The Kansas City Northwestern Railroad Company, Appellant. VS. Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased; E. A. Kelly, Administrator *de bonus non* of the estate of L. Zimmerman, substituted for Frederick Zimmerman, Administrator Appellee.	No. 231

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The facts upon which this suit rest, briefly stated, are as follows:

L. Zimmerman, in his lifetime, was the owner of certain lots in the City of Leavenworth; some of the lots owned by him were on the west side and

some on the east side of Second street, a duly and lawfully established street in said city, with an established grade, running north and south through said city and which street had been duly opened as well as established for many years and was and is one of the principal thoroughfares of said city.

In May, 1887, The Kansas City, Wyandotte and Northwestern Railroad Company constructed and built a railroad in a northeasterly direction through the City of Leavenworth, until it came to the south line of Zimmerman's property, and then, without any right or authority from him and without condemning the same, it appropriated a part of his property and constructed its road between said lots across and over that part of Second street immediately in front of said lots, and raised and made a high embankment of a permanent nature the whole width of said Second street and placed iron rails thereon and thereby changed the established grade of said street (as long prior thereto established by the City of Leavenworth) to a height of three feet immediately in front of said lots, and from that time on continued to operate engines, cars and trains daily thereon and seriously and permanently impair egress and ingress thereto and therefrom. (See findings of fact R. 53)

In February, 1889, Zimmerman instituted suit against the Kansas City, Wyandotte and Northwestern Railroad Company in the District Court of Leavenworth County, Kansas, to recover damages for the appropriation of the right-of-way as aforesaid.

In May, 1897, he recovered a judgment for $3000.00 with interest thereon from date until paid at the rate of six per cent per annum and his costs; shortly after recovering said judgment said L. Zimmerman died and Frederick Zimmerman, his son, was appointed administrator of his estate and the action and judgment was revived in his name.

Subsequent to the taking of L. Zimmerman's land, as aforesaid, the railroad company gave a mortgage on all its railroad property, rights and franchises to The Farmers Loan and Trust Company of New York to secure certain bonds issued by said Kansas City, Wyandotte and Northwestern Railroad Company; default was made in the payment of said bonds or some interest thereon and suit in foreclosure was instituted in the Circuit Court of the United States for the District of Kansas, First Division and in January, 1893, a decree was entered against said company foreclosing said deed of trust and ordering that the property be sold.

Sometime in the year 1894, under said decree, the property was sold to George C. Smith and B. P. Waggener, who were the agents and purchasing trustees for the appellant company herein; and subsequently they made deed conveying the property to said company. B. P. Waggener, one of the purchasing trustees named as aforesaid, was the general counsel for the Kansas City, Wyandotte and Northwestern Railroad Company and was attorney of record in the suit brought by L. Zim-

merman, in his lifetime, against said company to recover damages for the appropriation of his land as aforesaid; and said Waggener had actual knowledge of the pendency of said action.

After the purchase of said road by the trustees and the appellant company as aforesaid it continued to retain possession of the right-of-way and Zimmerman's land seized by The Kansas City, Wyandotte and Northwestern Railroad Company and to operate their engines, trains and cars thereon; and in 1899 Frederick Zimmerman, as said administrator brought his action in the District Court of Leavenworth County, Kansas, against The Kansas City Northwestern Railroad Company, the appellant herein, seeking to have the District Court adjudge that by reason of the taking and retaining possession of the right-of-way appropriated as aforesaid by the old company that they be compelled to pay the judgment obtained by him against the old company or that they be enjoined from using said right-of-way. In said action Zimmerman also alleged that said appellant company was bound to pay his claim on account of the orders of the Federal Court made in The Farmers Loan and Trust Company foreclosure suit.

In due time the appellant company filed its petition and bond for removal and the transcript was filed in the Circuit Court of the United States for the District of Kansas, First Division, on the equity side of said court and in accordance with the equity practice of said court Zimmerman recast his bill. (R. 17 to 28)

In due time the appellant filed its demurrer to said recasted bill. (R. 28–29)

(When Zimmerman brought his action in the District Court of Leavenworth County, Kansas, he made Leavenworth City a co-defendant; after the action was removed to the Circuit Court of the United States for the District of Kansas and after recasting his bill as aforesaid, Zimmerman dismissed his action as to the City of Leavenworth and obtained leave to file an amended bill of complaint, which amended bill is set out in the record at pages 31 to 41.)

The appellant company then filed its demurrer to said bill and subsequently obtained leave and filed its amended demurrer to said bill. R. 42 to 46)

The ground or one of the grounds of the demurrers was that the District Court of Leavenworth County had no jurisdiction of the matter and this being a fact the removal to the Circuit Court of the United States by it did not give said Circuit Court any jurisdiction.

The reasons given by the company in its demurrer for claiming that said courts had no jurisdiction were that the bill of complaint alleged that the company was bound to pay Zimmerman's claim on account of the orders and judgment in The Farmers Loan and Trust Company foreclosure suit. Therefore the bill showed that that court had retained jurisdiction to determine the kind of

claim which Zimmerman claimed to have, and that if Zimmerman was entitled to any relief he must file his petition in intervention in said foreclosure suit.

Zimmerman also filed his motion to remand and thereafter said demurrers and motion came on for hearing and the motion of Zimmerman to remand was overruled and the demurrers filed by the appellant company were sustained. (See opinion and order R. 47 to 48)

Zimmerman then obtained allowance of appeal and filed his transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit. (R. 61 to 64)

Afterwards said appeal came on for hearing and brief and oral argument was presented by both parties and the Court of Appeals handed down its decision reversing the lower court and directing it to overrule the demurrers to the bills of complaint and for the lower court to proceed with the case in accordance with its views expressed in its opinion. (144 Federal, 622) and mandate (R. 65)

The appellant company took no steps of any kind or character after the decision of the Court of Appeals to have the action of that Court reviewed in this court; so after the expiration of 60 days, in accordance with the rules of said court, the mandate of said Court of Appeals was sent to the lower court.

On the 25th day of June, 1906, said mandate was spread of record and the Circuit Court set aside its order sustaining the demurrers heretofore mentioned and directed that 30 days be given to the defendant to elect as to whether or not it will stand upon its demurrer and have final judgment rendered against it thereon, or whether it will elect to answer, and in the event that it elects to answer, 60 days is given said defendant in which so to do. (R. 50 to 51)

On the 18th day of September, 1906, Zimmerman filed his motion asking the court to render a decree in his favor as prayed for in the bill of complaint and in accordance with the mandate of the Circuit Court of Appeals.

On the 27th day of October, 1906, said motion came on for hearing, the plaintiff being present by Atwood and Hooper, its attorneys, and the defendant by Hon. Frank Doster, its attorney, and thereupon the defendant asked leave of court to refile its demurrers to said amended bill, which was granted, the same, however, to be without prejudice to a hearing at this time on said motion. Said demurrers were refiled and a hearing of said motion was proceeded with and thereupon the court overruled said demurrers and ordered and decreed that the clerk enter an order in the order book that the complainant's bill be taken *pro confesso* as a matter of course. (R. 51 to 52, paragraphs 69–70)

On the 27th day of November, 1906, the decree

was taken herein adjudging that the appellant pay said Zimmerman's claim with interest and costs, etc. (R. 52 to 55)

The appellant company then obtained order allowing appeal (R. 58) and a transcript was filed in this court February 16, 1907.

ARGUMENT.

The decree of the lower court should be affirmed for the reasons set forth in the brief filed herein on the motion to dismiss. It is very apparent from the record that the appellant herein is seeking to have in this case a review of the decision of the Court of Appeals for the Eighth Circuit because there was nothing done by it in the lower court in any way that would justify said court to do anything else than to carry out the mandate of the Court of Appeals. No new grounds of demurrer were filed, no new pleadings, nothing was presented in the lower court by the appellant company that was not presented to the Circuit Court of Appeals, no new fact, no new law point. All it sought to do was simply to obtain leave to refile its demurrers. The demurrers were already filed to the bill, had been passed upon by the Circuit Court of Appeals. The mandate had come down from the Court of Appeals directing the lower court to overrule the demurrers and all that the appellant company did in the lower court, after that, was to ask leave to refile these same demurrers. This raised no new question, obtained for the company no new rights and was done for the

purpose of obtaining a pretext for taking this appeal to this court and thereby obtain delay. The demurrers were on file and to obtain leave to refile them was an idle ceremony; to take a pleading already on file and have the clerk refile it, amounts to nothing. By such a proceeding as this, the appellant company could not have obtained any new or greater rights than it had.

And for the reasons stated in our brief filed herein on the motion to dismiss and here stated, we submit that the decree of the lower court should be affirmed and that a finding should be made by this court that this appeal was taken for no other reason than to cause delay and that it is one of those cases that fall within paragraph 2 of Rule 23 of this court and that the appellant company should be adjudged to pay damages at some rate not exceeding ten per cent, in addition to interest, as provided for in said rule.

II.

If this court should be of the opinion that this appeal should not be dismissed or affirmed for the reasons above indicated, we, on the merits of the cause, respectfully submit that the District Court of Leavenworth County and the Circuit Court of the United States had jurisdiction to hear and determine this cause.

The appellant company contends that the state court was without jurisdiction to entertain the suit which Zimmerman commenced therein for

the reason that the Circuit Court of the United States for the District of Kansas, First Division, in the foreclosure suit of The Farmers Loan and Trust Company against The Kansas City, Wyandotte and Northwestern Railroad Company had retained jurisdiction to determine what claims the purchaser at such sale should pay; and that when a bill filed in any court, other than a bill in intervention in the Farmers Loan and Trust Company suit, alleging that the purchaser at such sale was bound to pay its claim on account of the orders and decrees rendered in the Farmers Loan and Trust Company suit, that that fact showed, that such court was without jurisdiction for the reason that jurisdiction over such matters had been reserved and retained to the Federal Court in the trust company's suit.

Further, that under such circumstances the suit was removable to the Federal Court as it drew in question the construction of a Federal decree, and it was intended, under the constitution and laws of the United States that the Federal Courts should have the right to determine the construction of their own decrees; that said Circuit Court acquired jurisdiction to determine whether the state court had any jurisdiction and if the state court did not have jurisdiction then that said Federal Court did not acquire any in that cause.

We quite agree with the contention of the appellant company that the case was removable for the reason that the construction of a Federal

decree, among other matters, was drawn in question. And under the decisions it was a removable cause. (See *First Natl. Bank* v. *Society for Savings*, 80 Fed., 581; *Zimmerman administrator* v. *Kansas City Northwestern R. R. Co.*, 144 Fed., 622.)

That the state court was without jurisdiction to entertain Zimmerman's demands we deny. Zimmerman's aim was to enforce the payment of a judgment obtained by him against the railroad company for appropriating his land; he was a citizen of Kansas, as was the company he sued; the subject matter was injuries done to his property; he brought his action in the courts of Kansas to enforce his claim and in his petition states that he was entitled to recover against the company not only on account of his legal and equitable rights, but on account of a decree of a Federal Court. Can there be any question but that the state court would have had jurisdiction to determine the rights of Zimmerman as against the defendant company, even if he did allege in his petition that some of his rights as against the defendant company were based upon a decree rendered in a Federal Court? We apprehend not. Many judgments rendered by the state courts have been interpreted and enforced by the Federal Courts and vice versa.

Zimmerman's land had been taken without due process of law; he brought suit against the company who appropriated it to recover its value and his damages sustained by reason thereof; he

obtained a judgment awarding him damages for such taking; he then began to try and enforce payment thereof and found that the company which had taken his land had sold all its property and was execution proof, and that the new company, who had bought the old company's property, had taken possession of his land and continued in the enjoyment thereof; he saw that the wrong that had been done to him by the old company, was being continued by the new company; he knew that the constitution provided, Article 12, Section 4, that,

> "No right of way shall be appropriated to the use of any corporation, until full compensation therefor shall first be made in money, or secured by the deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

He knew that the Supreme Court of his State in the case of *Cohen* v. *Railroad Company*, 34 Kansas, 158, had decided:

> "Where a railroad company has constructed and is operating its railroad through a piece of land belonging to another, without having obtained a right-of-way by any formal condemnation proceedings, and without having procured any title to the land over which it operates its railroad or any easement therein, *the*

> *owner of the land may waive formal condemnation proceedings and all formal modes of transfer, and elected to regard the action of the railroad company as taking the property under the right of eminent domain, and may commence an ordinary action to recover compensation for all the damages which he has sustained by reason of the permanent taking and appropriation of the right-of-way by the railroad company.*"

He knew what every citizen knew; that the Supreme Court of the United States had repeatedly decided what it decided in the case of *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641; L. C. P., Book 34, p. 295:

> "7. Though the land be entered on pending the appeal, the title does not pass, *and the land is not taken, until compensation is actually made to the owner.*"

In a word, he knew that his property could not be taken from him without due process of law. All this being so, what occasion had he to seek the Circuit Court? So far as the record shows, he was absolutely ignorant of the proceedings in that court, and being an unlettered man, he probably was ignorant of them; and whether he was or not, nobody can know, since he is now dead. It cannot be said that he had constructive notice, because the land wasn't embraced in the mortgage and so, wasn't within the jurisdiction of the Circuit Court.

But, assuming that he did know it, what occasion had he to seek that tribunal? He knew the law to be that if a corporation seized his land, without authority, and used it for railroad purposes, he had a right, as decided in *Cohen* v. *Railroad, supra*, to proceed to have his damages awarded, just as though the company had observed its statutory duty in the premises. He knew, too, that they could get no title to the land, until such award of damages was paid; and he knew, too, that whoever succeeded the old company in its wrong-doing, would get no better title than the old company had, which was no title at all; and that if such successor attempted to continue to occupy the land, he could enjoin them from so doing, or compel the appointment of a receiver to collect his payment.

So, after obtaining his judgment against the company who first appropriated his land, and it failing to pay, and having no property upon which execution could be levied, and finding the defendant company in possession of the land, he brought a suit against that company, the successor to the old wrong-doer, and in so doing did what the Code of his State required of him, viz: to state the facts which constituted what he claimed was his cause of action, and to pray for relief. And this relief should be granted him. Upon this point, the Wisconsin courts have spoken as follows:

"While a judgment against a railroad

company for the taking of land on which its road was constructed remained unpaid, a mortgage of the road with all the property and franchises of the company was foreclosed, and the purchasers organized under the statute of a new company, which, with knowledge of the facts, has continued to operate its road over said land. Held, that equity will restrain the company from further maintaining and operating its road over said land, except upon payment of such judgment against the old company.

* * * *

"The facts that the judgment against the old company was obtained two years before the foreclosure sale, and that the road had been operated over the land during that time, and that no further steps were taken by suit to enforce payment of the damages until the new company had been occupying the land for thirteen years, do not constitute a waiver of the owner's right to compensation.

"The right of the land-owner to maintain an action for the equitable relief above stated, being 'founded upon the title to real property,' is limited to twenty years by Sec. 3, Ch. 138, R. S.; and neither Sec. 6 nor Sec. 22 of that chapter has any application.

"Ejectment would lie in plaintiff's favor to recover the land from the railroad company."

Gilman v. *The Sheboygan & Fond du Lac R. R. Co.*, 40 Wisc., 653.

This was but following the established doctrine of that State, for in 18 Wis. 164 the court said:

"The plaintiff's land was appropriated by a railroad company for its roadway, and the damages assessed by the commissioners under its charter, and a judgment for the amount rendered in the plaintiff's favor on the appeal of the circuit court. Before the judgment was paid, the railroad was sold under a mortgage (which covered, among other things, the company's right of way), to persons who organized a new company pursuant to the statute, and continued to operate the road, using the track as laid across plaintiff's land. *Held*, that the plaintiff had a right of action on the judgment, against the new company.

"If the new company had asserted no right to use the plaintiff's land under its purchase, it would not have been liable on the judgment,(*Vilas* v. *M. & P. du Ch. Ry. Co.*, 17 Wis. 497; *Smith* v. *C. & N. W. Ry. Co.*, ante 21.)

"But in taking possession of the land and assertion of a right to use the same, was an election to adopt the original taking and receive the benefit thereof; and subjected it to the conditions under which that right existed in favor of the old company.

"Perhaps the plaintiff might have treated either company as trespasser *ab initio*, if, while using his land, it neglected for an unreasonably long time to pay the damages adjudged to him; but it did not rest with the old company to claim the character of a mere wrong-doer, after proceedings had, to condemn the land; nor with the new to claim that character, after taking and using the land under its purchase."

Pfeifer v. *The Sheboygan & Fond du Lac R. R. Co.*, 18 Wis. 164.

The courts have used the expression "lien" rather loosely. In nearly all, if not quite all, the States, the law is, that title does not pass to land taken under the right of eminent domain, until the land owner has been compensated. Where a title has not been divested, the owner, of course, can hardly be said to hold a lien upon it, as the word "lien" would suggest the absence of title in the lien holder, and the presence of title in somebody else; but though some of the courts have made use of this term, thus inartistically, it is

only too manifest that the thought sought to be thereby expressed, was that where land was taken from a person by eminent domain, that there remained in such land owner the right to compensation, which he could enforce against either the one taking the land, or any successor in interest to the one taking the land; and the case at bar, of course, is a case of the taking under the right of eminent domain; for while there were no statutory condemnation proceedings, yet under the Cohen case in 34 Kansas, from which we have quoted, *supra*, Zimmerman had a right to treat the taking as though by condemnation, and sue for his damages, which he did.

The Supreme Court of Massachusetts has aptly expressed the principle involved on page 576, of Vol. 127 of the Massachusetts Reporter, (*Drury* v. *Midland R. R. Co.*) when it said: "The power to *take* and the obligation to *indemnify* for the taking are *inseparable*. They are parts of one transaction." And the Supreme Court then cites in support of the proposition: *Haverhill Bridge* v. *County Commissioner*, 103 Mass. 120; *Connecticut River Railroad* v. *County Commissioners*, 127 Mass. 50. This last case was a case where an act was declared unconstitutional which provided for the taking of land for depot purposes by a railroad owned by the Commonwealth of Massachusetts, and providing that the land should be paid for from the earnings of the road. But of course, authorities are hardly necessary upon this general

principle. The case of *Drury* v. *Midland R. R. Co.*, just cited, was one where there was a shift of the ownership after the taking, as in this case. The syllabus is as follows:

> "By the law of this Commonwealth, a person, whose land is taken by a railroad corporation under the right of eminent domain, has a right to compensation, which, if not strictly a lien, is at least in the nature of a lien or incumbrance upon the land; and this right may be enforced against a corporation which is the successor of the corporation taking the land.
>
> "A railroad corporation took a parcel of land under the right of eminent domain. Subsequently it mortgaged its property to trustees to secure bonds to a certain amount, which stated that 'the mortgage was the first and only lien on the property and franchises of the company, when the existing mortgage debt is retired.' The making of this mortgage was ratified by the Legislature. The mortgage was afterwards foreclosed, and the bondholders formed a new corporation; and their acts in so doing were confirmed by the Legislature, and the new corporation was vested with all the franchises, powers and privileges of the old corporation, and

made subject to all the restrictions, duties and liabilities, set forth in the general law relating to railroad corporations, then or thereafter in force. *Held*, that the new corporation might properly be made a party respondent to a petition for damages, originally filed by the person whose land had been taken, against the old corporation, and might be restrained from using or occupying the land, unless the damages were paid or secured to the land-owner."

Drury v. *Midland R. R. Co.*, 127 Mass. 571.

Another case very similar to ours is *Bridgman* v. *St. Johnsbury and Lake Champlain R. R. Co.* This case is reported in several places, 58 Vermont, 198; 23 American and English R. R. Cases, 30; and 2 Atlantic Reporter, 467. The constitution of Vermont seems to provide that where land is taken by eminent domain, the land owner has given him what they call a lien, for his damages; that if the same is not paid within a certain time, the land owner can bring suit to recover the same. This case is authority on two points: First—That the old company, the Kansas City, *Wyandotte* and Northwestern Railroad Company is not a necessary party to this proceeding, and, second, that the judgment is a finality. The syllabi, bearing upon our point, are as follows:

"In a suit in equity to recover land

damages by foreclosure of an equitable lien on land taken by a railroad for railroad purposes, a former company which took the land and to whose rights the defendant company succeeded, is not a necessary party.

"The owner of land taken by a railroad for railroad purposes, has a lien on the land enforcible in equity for his damages; and the lien is not affected by the bringing of a suit against a former company, which took the land, and by obtaining a judgment under the statute—R. L. Sec. 3371; and such judgment is final, as to the amount of damages to be recovered in a proceeding to foreclose the lien against a subsequent company which succeeded to the rights of the first company."

Bridgman v. *St. Johnsbury, Etc., R. R. Co.*, 23 A. & Eng. R. R. Cases, 30; 58 Vt. 198; 2 At. R. 467.

The concluding clause is, as the court will observe, authority upon the proposition that the defendant company in this case is bound by the judgment rendered against the old company.

The Texas Supreme Court, in the case of *Rio Grande & E. P. Ry. Co.*, v. *Ortiz*, 12 S. W. 1129, takes the same position. The syllabus is as follows:

"1. As the Texas statutes require a railroad company to first pay the compensation before appropriating land, one upon whose land a railroad company has entered without condemnation does not lose his lien or title by recovering judgment in a suit for damages, and may recover compensation from the purchaser of the rights of the first.

"2. That in a suit to foreclose the first mortgage bonds of the company, the judgment was rejected by the court as not being a claim to be paid out of the proceeds of the sale, does not preclude the owner from recovering compensation from the purchaser at the sale, who continues to occupy the land.

"3. The amount of a judgment recovered for entering upon land by a railroad company is the proper measure of damages, as against its successor.

"4. The purchaser of a railroad at foreclosure sale, under a decree that the purchaser hold free from all liens and incumbrances, is not an innocent purchaser as against one whose land has been appropriated without condemnation or compensation."

This is also an authority upon the two points, that the defendant company is liable, and that the

old judgment is the measure of its liability. This case is like the one at bar, the taking of the land being by seizure, without any process at law. Under the Texas law, the railroad had no right to take land unless "it first paid a just compensation to the owner," and the Supreme Court speaks of the land-owner's claim in that case as a lien, again illustrating the loose use of that term. This case is also authority upon the point that the argument of the railroad company in this case was not sound when it contended that we should have presented our claim to the federal court; for in this Texas case, the land-owner presented his claim to the federal court, but the same was rejected upon the ground that such damages could not be paid out of the funds resulting from the foreclosure sale, for the reason that, since the land had never been paid for, the title still remained in the land-owner. This whole case is very interesting and well worth reading.

Very many of the cases which are authority upon the point that the company, which is successor to the company taking the land, is liable to the land-owner, are also authority upon the other proposition, that the successor company is bound by the judgment rendered against the old company. To avoid a repetition of citations we will treat these propositions separately.

PURCHASING COMPANY MUST PAY IF IT TAKES THE LAND.

The Pennsylvania doctrine is found in the leading case of *Railroad* v. *Johnson*, 59 Pa. St. 290. In that case, the land was taken by the Northwestern Railroad Company. Under mortgage, all the company's rights and property were conveyed to the Western Pennsylvania Railroad Company. An act of the Pennsylvania Assembly made all claims of the old road liens on the new, but in determining the case, the court said, after speaking of the statute:

> "But the case rests upon other grounds. The plaintiff, who has never parted with his rights, stands on the higher fundamental right of property—that it shall be taken and used by *no* one for the public purpose of a railroad without just compensation being made to him. *Navigation Co.* v. *Coons*, 6 Watts & S. 114; Yost's Report, 17 Pa. St. 524; *Borough of Harrisburg* v. *Crangle*, 3 Watts & S. 460. *This is a sacred constitutional right, not to be spirited away by refinement.* If, therefore, the original occupant has so managed its card as to escape payment until it has divested itself of its interest by any form of alienation, its alienee, mediate or immediate, if it would enjoy the uncompensated right, must pay the price of it, unless it can show an equity

growing out of the conduct of the owner of the soil which would estop him. It must not be forgotten we are treating of a case where the owner has done nothing to divest his right by his own act or alienation, but where the alienee of the original actor stands upon a seizure at law, which must be shown to have conformed to the law in all its steps in order to deprive the owner of his title. * * * This, we have seen, is not a mere lien; the judgment in the process of assessment not being the source of his right, but the means only of ascertaining the amount of his claim and of enforcing its payment. It could be extinguished only by payment or release. When the alienees of the Northwestern Railroad Company came into possession, therefore, under their purchase (if at all), they took the interest acquired *cum onere*. If possession never had been obtained, then clearly they could get it only by payment or security. In law and equity neither they, nor anyone claiming the interest of the Northwestern Railroad by an act of eminent domain, subordinated by the law and the constitution to payment as the condition of its exercise, can hold and use the interests thus acquired without compensation. *Borough of Harrisburg* v. *Crangle*, 3 Watts & S. 460."
R. R. v. *Johnson*, 59 Pa. St. 295.

The Supreme Court of Arkansas, in the case of *Organ* v. *Memphis & L. R. R. Co.*, 11 S. W. 96, decides a case similar to ours in the same way. Syllabi 3 and 9 read as follows:

> "Though the owner may have lost his right to an injunction by reason of his laches, equity will enforce his claim to compensation, as it does a vendor's lien, so long as his title has not been divested by adverse possession.
>
> "Where a railroad company appropriates land without authority of law, and without compensation, a company purchasing the former's right and franchises on foreclosure sale acquires no better title than it had, and takes the land subject to the right of the owners to enforce their claims as prescribed by law."

In a word, the Arkansas courts adopt the Pennsylvania doctrine.

In the case of *Lake Erie & W. Ry. Co.* v. *Griffin*, 8 N. E. 451 (Ind.), the same position is taken, and it is decided that not only is the defendant liable, but that it is bound by the judgment rendered. The syllabus reads as follows:

> "1. Where a new railroad corporation, succeeding to the property, rights, and franchises of an older company,

> enters upon land appropriated by its predecessor and continuously uses the same for railroad purposes to the exclusion of the land owner, it will be deemed to have adopted the original appropriation; and the value of the land having been determined in such original proceedings, by the judgment of a court of competent jurisdiction, the new company is, in equity, liable therefor, and it cannot escape such liability by afterwards abandoning the land."

Another Indiana case is *Railroad* v. *Galey*, 39 N. E., 925. The syllabus is as follows:

> "Where a landowner obtains judgment in condemnation proceedings against a railroad company for land appropriated by it for railroad purposes, its successor, which enters on, uses, and occupies the land for the purposes for which it was condemned, is liable to such owner for the amount of such judgment. *Railroad Co.* v. *Hammond*, 32 N. E., 83, 132 Ind. 475, followed."

Other authorities on this proposition are *Levering* v. *Railroad*, 8 Watts & Sargent (Pa. Report), 459, s. c. 20 A. & E. R. R. Cases 378; *Gillison* v. *R. R. Co.*, 7 So. C. 173; and *Stacy* v. *R. R.*, 27 Vt. 39–44–45, s. c. 20 A. & E. R. R. Cases 378.

The same doctrine is found in *Provolt* v. *R. R.* 57, Mo. 256. The syllabus is as follows:

> "Private property cannot be taken even in the exercise of eminent domain, without compensation to the owner; and before the title can be absolutely vested by virtue of proceedings for condemnation, *payment becomes indespensably necessary.* But where a railroad company commences proceedings under the statute for condemnation of private property, and the commissioners award a given sum as damages, and the court decrees, that on payment thereof, title shall vest in the company, and the owner files his objections to the award and procures a higher assessment, but does not insist on prepayment as a condition precedent to a surrender of the land, nor attempt to obstruct or in any way impede the progress of the work, and by such acquiescence, induces the company to expend large sums upon the road, he cannot maintain ejectment against the company simply on the ground of such failure of prepayment. In the case supposed, of course the strict title will not pass to the company till the paying of the damages awarded.
>
> "*The owner will, however, have other and sufficient remedies, e. g., a court of equity would unquestionably interfere, if neces-*

> *sary, and place the road in the hands of a receiver until the damages are paid from the earnings of the road.*"

The Iowa courts hold in the same way:

> "2. A railroad company which enters upon land and appropriates a right of way without proceedings to condemn, or contract with the owner, or rendering him compensation therefor, is a mere trespasser and acquires no right to hold the land.
>
> "3. A land owner may institute proceedings to recover compensation for a right of way after the railroad is completed.
>
> "4. An injunction will lie to restrain the company from continuing to operate its road, after an award of damages under the statute, until the damages awarded are paid.
>
> "5. In like manner, the lessee of the company constructing and owning the road may be enjoined from operating it until payment of damages legally awarded."
>
> *Hibbs* v. *Railroad*, 39 Iowa, 340.

As we have already stated, the term "lien" is loosely used in several decisions, but whether

called a lien or a right incident to absolute ownership, which last is the more correct expression, the authorities are united upon the proposition that compensation must be paid by, and that the right to compensation can be enforced against, any successor to the taker of the land.

> "The doctrine is that as condemnation is a forced sale, the landowner has a lien on the land for the unpaid purchase money which follows the land even into the hands of a subsequent purchaser of the franchise."
>
> *Sedgwick* v. *Watford, etc., R. R. Co.*, 36 L. J. (Ch.) 379.
>
> *Viner* v. *Hoylake R. R. Co.*, 17 W. R. 92.
>
> "The operation of the road, it is said, may be enjoined until the compensation is paid, especially where the original corporation is insolvent, or a receiver be appointed."
>
> *White* v. *Nashville, etc., R. R. Co.*, 7 Tenn. 518.
>
> *Dayton, etc., R. R. Co.* v. *Lewton*, 20 Ohio. St. 401.
>
> *Pell* v. *Cambrian, etc., R. R. Co.*, L. R. 2 Ch. App. 100.
>
> *Lewes* v. *Combrian R. R. Co.*, 36 L. J. (Ch.) 565.
>
> "In Vermont, besides the principal case, other cases hold that the land-owner has an equitable lien on the land which a court of chancery will enforce."

Kittell v. *R. R. Co.*, 56 Vt. 96; s. c. 20 A. & E. R. R. Cases 165.

Kendall v. *R. R. Co.*, 55 Vt. 438; s. c. 14 A. & E. R. R. Cases 423.

Adams v. *R. R. Co.*, 57 Vt. 240.

"which lien will not be effected by a judgment against the company that owned the road."

Root v. *Lord*, 23 Vt. 568.

Mathews v. *Lucia*, 55 Vt. 308.

Child v. *Allen*, 33 Vt. 476.

Williams v. *R. R.*, 60 Miss. 589; s. c. 20 A. & E. R. R. Cases 378.

Williams v. *R. R. Co.*, 60 Miss. 689; s. c. 20 Am. & Eng. R. R. Cases 378.

"The lien is enforceable against any party who claims under the party that made the entry."

Pierce on Railroads, 167.

Gilman v. *R. R. Co.*, 40 Wis. 653.

R. R. v. *Johnson*, 59 Pa. St. 290.

Drury v. *Midland R. R. Co.*, 127 Mass. 571

And to the point that the judgment against the first company is conclusive as to the amount as against subsequently purchasing companies in privity with the first company, see also

New York, etc., R. R. Co. v. *Stanley*, 34 N. J. Eq. 55.

Pfeifer v. *S. & F. R. R. Co.*, 18 Wis. 155.

Bridgman v. *St. Johnsbury, etc., R. R. Co.*, 23 Am. & Eng. R. R. Cases 35.

As we have already stated, Zimmerman instituted his suit against the company in the Leavenworth District Court. The defendant company removed it, not on the ground of diverse citizenship, but because the case necessitated an interpretation of the decree of the United States Circuit Court.

It doubtless would have been as wise for Zimmerman, at the time he instituted his present suit, to have left out of the petition he filed in the State court, any reference to the federal decree. His cause of action was perfect without it, but he did insert such allegations and probably their presence in the petition, made the removal proper, and gave to the federal court, jurisdiction; but no worse can happen as a consequence of this mistake, if it be so considered, than delay, because the same rules obtain here as in the State courts with reference to such matters. The equities are so strong in Zimmerman's behalf that it is difficult for us to see how the demurrer can be sustained.

Surely the new company can have no higher rights than the old company. If the old company could not convey to the new company a title to the land in question, *directly*, by making a deed to the new company, then surely it could not convey title *indirectly*, by making a mortgage to the Trust Company and having the Trust Company foreclose and a sale made by a master and a deed executed by the direction of the court. All this legal legerdemain could not take from the old company

something that it did *not* possess. Of course, even if the old company had no title to this land, proceedings might have been had by making Zimmerman a party to the foreclosure suit, by which his rights to the land might have been wiped out, but nothing of the kind was done.

Just stop and think for a minute what a monstrous result would follow from adopting the conclusions clamored for by the defendant. They ask the court to say, that in a foreclosure suit, a judge can make an order, saying that everybody, who has a claim of any sort against the defendant company, must come in and present his claim in that court, or be forever barred; and that if a man didn't know of the existence of such a case and had never been served with any summons, nor in any way made a party to such a case, he must, nevertheless, if he did not present his claim (to a court that perhaps he never heard of), be robbed of his remedy; and as a consequence of such a decision, the law would be established to be, that a railroad company can seize a man's land without pretense of right, and while holding him in prolonged litigation give a mortgage *on other property than this land*,—allow the mortgage to be foreclosed,—have its own property sold and get inserted in the decree, that everybody must present their claims to the foreclosing court or be forever barred; and then purchase at the foreclosure sale; and thus get a title to the land without ever having paid a penny for it. And this in the face and eyes of the Constitution,

both State and National, and the multiplied decisions of all courts of last resort, that no man's property can be taken from him, without due process of law, and that the rights of eminent domain cannot be exercised, so as to take one's land without paying for it.

It is no answer to all this to say that he *could* have come into the Circuit Court and have Judge Caldwell award him a remedy. The reply to that suggestion is that he never knew of the decree that gave that privilege; he was neither a party to the suit, in which the decree was rendered, nor a privy to any parties to that suit; and if he had gone there, under the authority of the Texas case, cited, *supra*, he would have been answered that the fund resulting from the foreclosure sale was a fund resulting from the sale of property *covered* by the mortgage; that the mortgage covered *only* the property of the railroad company; that this land had *never* been owned by the railroad company; and that the damage was such a thing as could not be paid out of the proceeds of the sale; and finally, such a decree as to him, was a nullity, because he wasn't a party to that suit.

The Company below talked about priority of lien. There is here no question of priority of liens. The Trust Company never had a lien on this land, and the defendant company has neither lien on, nor title to this land. The Federal Courts have not yet reached the point of selling people's land upon which nobody has a claim. All that Judge

Caldwell could order to be sold, was the property covered by the mortgage, and all that the mortgage could cover, was that which the *mortgagor* owned; and nobody can say that the old company ever owned this land, because it never paid for it, and there is no pretense of a prescriptive title. Hence all that is said in counsel's brief below about priority of liens, are idle utterances. Counsel says in his brief, used below, that such an award as this, is not a personal judgment against the company. We agree to that. The old company would have had the privilege to pay the price or leave the land, and the new company has the same privilege today, if it will restore us to our *statu quo.*

We don't have to discuss what would be the consequence if this was an ordinary judgment for the recovery of money, because it isn't such a judgment. It is just such a judgment as was rendered in the Cohen case in 34 Kansas. It is an award of damages.

A number of authorities were cited by the company in its brief employed in the Circuit Court, and in anticipation of their being presented here, we will answer some of them in advance, but those only upon which the company seemed most to rely.

The case of *Jessup* v. *Wabash Railroad,* 44 Federal 663, was an action arising out of a proceeding against a receiver, and of course, the court appointing the receiver had cognizance of the matter.

The whole argument in defendant's brief, used below, is founded on the misconception that the Trust Company's mortgage gave to the Trust Company a lien on *this* land. We have shown how that cannot be so.

That portion of that brief, in which the company discusses the question as to the judgment binding this defendant when this defendant was not a party to that action in the Leavenworth District Court is exploited in forgetfulness of the fact:

1st: That this company is a privy of the old company, and,

2nd: By taking its property, exercising its franchises and continuing to hold unlawful possession of the land in question, it adopted the acts of the old company and bound itself to the discharge of the obligations resulting from those acts.

See authorities cited above.

The company contended below that on the authority of the Fechheimer case (36 Kansas, 45), that Zimmerman was confined, in the way of remedies, to an injunction suit. The second syllabus of that case is as follows:

> "2. Where a railroad company enters upon land and constructs its road without the consent of the landowner, and without making compensation for the land taken and injured, the owner may pursue any

> one of the several appropriate remedies, and may, where the road is in its nature, design and use, of a permanent character, elect to bring an action for a permanent appropriation and injury, but in such a case it should appear that the verdict and judgment include damages for the entire injury; and it should also clearly appear from the pleadings, or from the evidence, findings and judgment, what interest in the land the owner had parted with, and also what interest has been acquired by the company."
>
> *W. & W. Rld. Co.* v. *Fechheimer*, 36 Kans. 45-46.

In the body of the decisions, Justice Johnson said:

> "The defendant in error was at liberty to choose any one of several appropriate remedies; but if the pleadings only warrant the recovery of compensation for the damages occasioned by the company down to the time of bringing the suit, the judgment would not operate to transfer any title or easement to the company. She now says that she elected to bring her action for a permanent appropriation and injury, and tried the case upon that theory."

And the case was treated as a case of that

character. Now, the several appropriate remedies that lay open to Zimmerman, were at the most four:

1st: An action enjoining them from going upon the land;

2nd: An action of ejectment;

3rd: An action for trespass, *quare clausum fregit*, or

4th: An action such as indicated in *Cohen* v. *Railroad*, 43 Ks. *supra*.

Zimmerman chose to avail himself of the last remedy. As in the Cohen case, his land had been improperly seized; as in the Cohen case, he had a right to waive the trespass, etc., and proceed as though the company had taken the land under the statute, namely: by seeking to have an award of damages rendered in his favor. And this last, he did.

There was no proceeding at common law, by which, when a trespass like this was commited, the wronged landowner could proceed to have an award of damages made in his behalf, which would result in the trespasser acquiring an easement over the land. The most that he could get at common law in the way of money damages, would be that which would measure the damage done to his land by the trespass, down to the time that the suit was instituted, or possibly, down to the time the suit was tried; but in the trial of this case, as in the trial of the Fechheimer case, the

parties recovered for all damage, past, present and prospective.

The Fechheimer case was, by the Supreme Court, sent back for a failure of the trial court to submit certain special questions, and came back to the Supreme Court again, whose second action thereon is reported in 49 Kansas, 643. At page 661, the court says:

> "The railroad company did, as a fact, occupy a portion of the plaintiff's land, * * * This fact gives the plaintiff the right to recover damages as for a permanent taking and appropriation of a portion of her property. She may recover for the depreciation in the value of her property caused by the permanent taking and appropriation of a portion thereof."

Thus, it is clearly seen that one of the "appropriate remedies" mentioned in the first Fechheimer case is a proceeding like that in the Cohen case; and thus, it is also clearly seen that the Fechheimer case in no wise supports this contention of the Company made below, that Zimmerman was confined to a suit for an injunction or an action in ejectment.

Reverting again to the proposition that this company is bound by the judgment against its wrong-doing predecessor, to which wrong-doer, it is a privy in the premises: The authorities already

cited in this brief, establish this proposition; and the reason of things moves with the decisions. The law incident to the power of eminent domain, never intended that a man should be compelled to litigate many times, his right to an award, but only once.

Defendant's position is that because the present company was not a party to the Leavenworth County suit, that they are not bound by that judgment. It must be borne in mind all the while that their only claim of right to possession of this land is as a grantee of the old company through the action of the Circuit Court. There is no pretense that this company ever took steps to acquire title to this land; that it ever bought it or occupied it for the requisite prescriptive period. If they have any right, it comes from the old company through the Circuit Court. Bearing this in mind, the unfairness of the position of the company is made manifest. To hold with them would be saying that a man whose land was taken by the power of eminent domain, or its equivalent, could litigate his claim for an award against the company taking it; and get a judgment; and then if, just as he gets his judgment, the property of the company was sold to another company, he would have to litigate the matter all over again with the new company for the reason, forsooth, that the new company was not a party to the old suit; and just as he had gotten a judgment against this second company, if the road chanced to be sold again, he would have to litigate it a third time with the

third company, and so on *ad infinitum*. And the illustration is not an absurd one, but quite within the possible and probable. This very railroad began life as The Leavenworth & Olathe Railroad and then became The Leavenworth, Wyandotte & Northwestern *Railway* Company and then became The Kansas City, Wyandotte & Northwestern *Railroad* Company and finally the present, The Kansas City Northwestern Railroad Company. No, the law does not impose upon a man, whose land is taken against his will, such a hardship as this, in order to get that which the constitution awards to him, namely: the value of the land so taken.

Under the authority already cited, it is clear that the new company must pay for land or abandon possession of it and restore the *statu quo*, because of the privity existing between it and the wrong-doing predecessor, and because, by adopting and continuing the acts of its predecessor, it assumes the obligations that rested upon its predecessor; and because, being wrongfully in possession of this land, without a title, it must pay what has been once fairly adjudicated to be the proper amount to be paid, in order to entitle them to remain in possession.

And, of course, what is true of one whose land is regularly condemned, is true of one, who has the *right* to proceed against the company in the *same way* that he would have the right to proceed, if his land had been regularly condemned.

If it should be urged that technically there could not be privity in a tort the answer would come that the word privity, as expressive of the relations between these two companies, is as accurate a description of such relations as the word lien used in many of these cases is an accurate description of the lien holder's right in such premises. Strictly speaking, it might be said that there could not be privity in such a case, but the fact remains that whatever claim the succeeding company has, it got from its predecessor. It is occupying the shoes of the wrong-doing company; it is doing exactly what the wrong-doing company did, which occasioned the judgment in question; the judgment was determinative of all the damage done to Zimmerman, both the value of the land taken, the damage done to the land not taken, and the damage done by the occupancy of the street; Zimmerman has litigated the whole question once; his rights in this regard have been judicially fixed and the successor in interest to the company, against whom this judgment is rendered, is bound by it.

THE COMPANY'S USE OF SECOND STREET WAS THE SAME AS TAKING HIS LAND.

While we hardly feel that it is necessary to consider this aspect of the case, since they cannot go behind the judgment, which is the basis of our right, yet since something was said about it in the proceedings in the Circuit Court, we will cite authorities upon it.

"The owners of lots on a city street, the fee of which is in the city, the lots themselves having originally been owned by the city, and conveyed by it with a covenant that the street should continue open forever, are entitled to have the street kept open and continued as a public street for the benefit of their abutting property."

"Such a right of easement is 'property' within the meaning of the constitutional provision requiring compensation for the taking of private property."

"The erection and operation of an elevated railroad,—such as that described in the evidence in this case,—which, as a matter of fact, will to some extent obscure the light of the abutting premises and impair their general usefulness and depreciate their value, was Held incompatible with and destructive of the use of the street as such, and is the taking and appropriating of the property of abutting owners for public use; and also in violation of statutes by which the corporation was bound. (Chap. 606, Laws 1875; chap. 140, Laws of 1850; chap. 697, Laws 1866; chap. 489, Laws 1867.) *People* v. *Kerr*, 27 N. Y. 188; *Kellinger* v. *Forty-Second St. Ry. Co.*, 50 id. 206; *Transportation Co.*, v. *Chicago*, 99 U. S.

635; *Lansing* v. *Smith,* 4 Wend. 21; *Gould* v. *Hudson River R. Co.,* 6 N. Y. 522, explained and distinguished."

Story v. *N. Y. Elevated R. R. Co.,* 90 N. Y. 122.

"Damages, Nature and Measure Of.—But where the wrong is of a permanent nature, and springs from the manner in which the track, as fully completed, affects approach to the lot, then, notwithstanding the right which the state retains to control the manner of use of a highway by a railroad company, even if deemed necessary to compel an entire removal of its track, the lot owner may treat the act of the company as a permanent appropriation of the right of access to his lot; and recover, as damages, the consequent depreciation in value of the lot; and in such cases the recovery of damages is a consent on the part of the lot owner to such manner of occupying the street, and concludes both him and any subsequent owner of the property."

The C. B. U. P. R. R. Co. v. *Twine,* 23 Kans. 585.

"Under a state constitution which forbids the taking or damaging of private property for public use without compensation, a railroad company cannot use a street for its track, even under

legislative or municipal authority, without compensation to adjoining lot owners for injury to their property and its consequent diminuation of value."

The Hot Springs R. R. Co. v. *Williamson*, 136 U. S. 121 L. C. P., Book 34, p. 355.

CONCLUSION.

In conclusion, we say that Zimmerman should prevail in this matter. His land was taken; he pursued a course declared by the Supreme Court of his State to be an appropriate remedy in seeking redress; a judgment was rendered in his behalf; the defendant company is the successor in interest to the wrong-doing company; it continues to occupy the land, the taking of which gave rise to the judgment; its only claim to such land is by and through the wrong-doing company; Zimmerman must be granted this remedy, or the fundamental law must be violated; and the amount of his judgment should be held to be a finality, for to hold otherwise would be establishing a doctrine which might often result in such law's delay as would be equivalent to a denial of justice.

Respectfully submitted,

JOHN H. ATWOOD,
WILLIAM W. HOOPER,
Solicitors for Appellee.

KANSAS CITY NORTHWESTERN RAILROAD COMPANY *v.* ZIMMERMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 231. Submitted April 28, 1908.—Decided June 1, 1908.

Where the ground on which the jurisdiction of the Circuit Court was denied did not go to its jurisdiction as a Federal court as such, but its jurisdiction was denied on the ground that the state court where the proceedings started had no jurisdiction, a direct appeal on the jurisdictional question will not lie to this court under § 5 of the Judiciary Act of 1891.

It is not open to a defendant who has secured a removal and successfully resisted a motion to remand to raise the question that the removal was improper on a certificate of jurisdiction to this court under § 5 of the Judiciary Act of 1891.

Appeal from 144 Fed. Rep. 522, dismissed.

THE facts are stated in the opinion.

Mr. Balie Peyton Waggener for appellant.

Mr. John H. Atwood and *Mr. W. W. Hooper* for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity to enjoin the appellant, hereafter called the defendant, from operating its railroad over certain land in Leavenworth, formerly belonging to the plaintiff's intestate, until a judgment against the defendant's predecessor in title for the damages caused by the appropriation of the land should be paid. It appears from the bill, among other things, that the defendant's predecessor appropriated the land without regular proceedings, and in 1889 the plaintiff's intestate began an action on which he recovered a judgment on May 15, 1897;

that the defendant's predecessor had mortgaged its road in 1888; that on March, 1890, a suit to foreclose the mortgage was begun, and in 1893 there was a decree of foreclosure; and that this decree was followed (in 1894) by a sale to the defendant. It is alleged that the defendant became the successor in interest to all the rights "and as part of the consideration assumed and was subject to all the liabilities" of its predecessor, "under and by virtue of said decree and purchase"; and again, "that under and by virtue of said decree and the ordinances of said city, said defendant assumed and agreed to pay off any and all obligations" of the earlier road.

The present suit was begun in a state court in May, 1899. In June the defendant removed it to the Circuit Court of the United States, on the ground that the determination of the cause involved the construction of the foreclosure decree and of the Constitution and of the laws of the United States. The bill was reformed, and the defendant demurred to the merits, and also on the ground that the state court had no jurisdiction, and that therefore the United States court had none. The demurrer was sustained by the Circuit Court on the ground of want of jurisdiction in the state court, but on appeal by the plaintiff the decree was reversed by the Circuit Court of Appeals and a decision rendered for the plaintiff on the merits. 144 Fed. Rep. 622. Thereupon on November 27, 1906, a decree was entered for the plaintiff. On January 17, 1907, an appeal to this court was taken by the defendant and allowed, and on October 23 of the same year a certificate was made that the question involving the jurisdiction of the Circuit Court was in issue and decided against the defendant, and thus the case now stands.

We do not deem it necessary to discuss all the difficulties that the appellant would have to overcome in order to maintain its case. It seems from the opinion of the Circuit Court of Appeals not to have insisted on the objection to the jurisdiction there, but to have taken its chances on the merits, 144 Fed. Rep. 624, as also by its demurrer it relied mainly on the want of equity

in the bill. See *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127. It comes here on the purely technical proposition that, although the plaintiff is in the right court, and although the case has been heard on the merits at the defendant's invitation, the plaintiff must begin over again because he did not come into court by the right way.

If the defendant had confined its defense to a denial of jurisdiction, there would be force in the consideration that the plaintiff, not it, took the case to the Circuit Court of Appeals. But in the circumstances of this case the defendant seems to us to stand no better than it would if it had taken the appeal to the Circuit Court of Appeals. *Carter* v. *Roberts*, 177 U. S. 496, 500. *Robinson* v. *Caldwell*, 165 U. S. 359. It is suggested that the Circuit Court of Appeals had no jurisdiction, citing *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277. But although the defendant in its petition for removal set up that the construction of the Constitution of the United States was involved, such was not the fact, and the language of the case cited does not apply.

It is enough, however, that the ground on which the jurisdiction of the Circuit Court was denied did not go to its jurisdiction as a Federal court. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225. The certificate does not purport to enlarge the record, but simply to state what was in issue. The record shows that the jurisdiction of the Circuit Court was denied on the single ground that the state court where the proceedings started had none. Whether that contention was correct or not under *Wabash Railroad Co.* v. *Adelbert College*, 208 U. S. 38, it had nothing to do with the jurisdiction of the Federal court as such, or indeed, at all, except for the reason that the power of a secondary tribunal can go no higher than its source. We may add that the jurisdiction of the Circuit Court, if it existed, was ancillary to its possession of the *res*, if it had it, that the principles to be applied are of general application, 208 U. S. 54, and again these do not concern the jurisdiction of the Federal court as such.

The defendant now, after having secured a removal and after having successfully resisted a motion to remand, attempts to deny the jurisdiction of the Circuit Court on the ground that the removal was improper. It is enough to say that that question is not open under the certificate.

Appeal dismissed.